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No. _____

In The

Supreme Court of the United States

LAND, ET AL.; CRIS REALMS INC.; RONALD J. ISAAC; BETTY PERRIN ISAAC; and CRISTINA INVESTMENT CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Must a landowner prove "bad faith" to recover just compensation when the market value of his property has been diminished as a result of the project for which his property has been condemned?

2) Is a determination that the Court of Claim lacks jurisdiction to hear an inverse condemnation claim *res judicata* on the jurisdiction of a district court to determine the actual date of taking of the property made the subject of the direct condemnation claim by the United States?

3) Does the appellate court have jurisdiction to make a *de novo* determination of facts when the district court has not ruled upon the issue?

CERTIFICATE OF INTERESTED PARTIES

1) Parties

   (A) The United States of America

   (B) Cris Realms, Inc.

   (C) Cristina Investment Corp.

   (D) Ronald J. Isaac, *et ux.*

2) Corporate Information

   (A) Cris Realms, Inc.

      (i) Cris Realms, Inc. has no parent corporation.

      (ii) Cris Realms, Inc. has no publicly held stock.

   (B) Cristina Investment Corp.

      (i) Cristina Investment Corp. has no parent corporation.

      (ii) Cristina Investment Corp. has no publicly held stock.

3) Law firms

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CERTIFICATE OF INTERESTED PARTIES – Continued

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(B) Cris Realms, Inc.

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(C) Cristina Investment Corp.

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(D) Ronald J. Isaac, *et ux.*

(i) Molaison Colvin Greenberg Zelenka Morris & Loeb, LLP

(E) Perrin Butler (Cris Realms, Inc.)

(i) Barbee & Stern

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CERTIFICATE OF INTERESTED PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

CITATION OF THE LOWER COURT OPINIONS ... 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

RECORD CITATIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING CERTIORARI 14

I. The Court of Appeals' interpretation of the "scope of the project" rule is contrary to well-established law applying the Just Compensation Clause 14

II. The Court of Appeals' decision is directly contrary to this Court's ruling limiting appellate jurisdiction 18

III. The Court of Appeals' decision is in conflict with numerous decisions which recognize that the district court has concurrent jurisdiction to determine the date of taking in a condemnation action 21

CONCLUSION 28

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Allen v. R & H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) 18, 19

Bayou des Familles v. United States, 130 F.3d 1034 (Fed. Cir. 1997) 26

Block v. North Dakota, ex rel. Bd. of Univ. and School Lands, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) 24

Click v. Copeland, 970 F.2d 106 (5th Cir. 1992) 20

First Interstate Bank v. United States, 61 F.3d 876 (Fed. Cir. 1995) 19

Georgia-Pacific Corp. v. United States, 568 F.2d 1316 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978) 22

Hensley v. West, 212 F.3d 1255 (Fed. Cir. 2000) 19

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986) 18

Martin v. Bedell, 955 F.2d 1029 (5th Cir. 1992), *cert. denied*, 506 U.S. 915, 113 S.Ct. 323, 121 L.Ed.2d 243 (1992) 19

Nilson v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) 26

Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987) 26, 27

Stephenson v. United States, 33 Fed.Cl. 63 (Fed.Cl., 1994), *mandamus denied*, 66 F.3d 345 (Fed. Cir. 1995) 22

TABLE OF AUTHORITIES – Continued

Page

Sociano v. United States, 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957) 25

United States v. 12.18 Acres of Land in Jefferson County, Kansas, 623 F.2d 131 (10th Cir. 1980) 17

United States v. 49.01 Acres of Land, 669 F.2d 1364 (10th Cir. 1986) 17

United States v. 320 Acres of Land, 605 F.2d 762 (5th Cir. 1979) 16

United States v. 422,978 Square Feet of Land, 445 F.2d 1180 (9th Cir. 1971) 23

United States v. Daim, 494 U.S. 569, 110 S.Ct. 1361 (1990) 24

United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958) 22

United States v. Ledford, 202 F.3d 283 (10th Cir. 1999); 1999 WL 1244495 23

United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir. 1958) 13, 14, 16

United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943) 15, 16, 17

United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986) 24

United States v. Reynolds, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970) 15, 16, 17, 19

TABLE OF AUTHORITIES – Continued

Page

Walther v. Lone Star Gas Co., 952 F.2d 119 (5th Cir. 1992) 20

West Jefferson Levee Dist. v. Coast Quality Const. Corp., 640 So.2d 1258 (La. 1994), *cert. denied*, 513 U.S. 1083, 115 S.Ct. 736, 130 L.Ed.2d 639 (1995) 9

STATUTES

42 U.S.C. § 4651(3) 16

U.S. Const. amend. V. 2

OTHER

1 Orgel, *Valuation Under Eminent Domain*, § 105, at 447 (2d ed.) 17

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: MAY IT PLEASE THE COURT.

Petitioners, Cris Realms, Inc., Cristina Investment Corp., and Ronald J. Isaac, *et ux.*, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the Untied States Court of Appeals for the Fifth Circuit entered in this matter on May 31, 2000.

CITATION OF THE LOWER COURT OPINIONS

The United States District Court judgment in this case, entered on October 28, 1998, in Docket No. 94-3327 CW/94-3519 & 94-3541, Eastern District of Louisiana, is unreported. It is reproduced in the Appendix attached hereto at App. 2. The district court's written reasons for ruling, entered on October 7, 1998, is reproduced as App. 3.

The decision rendered by the United States Court of Appeals for the Fifth Circuit on May 31, 2000, in Docket No. 99-30187, is reported at 213 F.3d 830. It is reproduced as App. 1.

STATEMENT OF JURISDICTION

This is an appeal from a judgment rendered by United States District Court for the Eastern District of Louisiana on October 28, 1998. Jurisdiction in the district court was based on 28 U.S.C. § 1331 and 1345. Plaintiffs

Cris Realms, Inc., Cristina Investment Corp., and Ronald J. Isaac, *et ux.*, appealed that decision on December 28, 1998. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The United States of America also filed a notice of appeal on February 19, 1999.

The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court on May 31, 2000. Appellants Cris Realms, Inc., Cristina Investment Corp., and Ronald J. Isaac, *et ux.*, timely petitioned for rehearing on June 14, 2000. The Court of Appeals denied the petition for rehearing on June 31, 2000.

CONSTITUTIONAL PROVISIONS

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. V.

RECORD CITATIONS

Citation to the Appendix attached hereto are demarcated as "App. ___." Citations to the record before the lower courts are demarcated as "R. Vol.___, at ___" referring to the record on appeal, at the specified volume and specified page.

STATEMENT OF THE CASE

This is a condemnation proceeding involving certain parcels of land in Jefferson Parish, Louisiana, which are being acquired for inclusion in the Jean Lafitte National Historical Park. The land at issue was originally purchased by Bayou des Familles Development Corporation ("BDF") for the purpose of developing residential subdivisions on the West Bank of the Mississippi River in Jefferson Parish. In 1972, BDF acquired 2182.62 acres of land for $7,161,200, at an average of approximately $3,000 per acre. *See*, District Court's Written Reasons for Judgment, App. 3, at 28 (contained in R. Vol. 5. at 1079-1098). Ultimately, defendant Cristina Investment Corp. acquired 97.02 acres from BDF of which 69.04 are the subject of this suit. *Id.*, at 27-28. Cris Realms, Inc. acquired an undivided interest in 25 acres in BDF land, of which 2.61 are the subject of this suit, *id.*, and Mr. and Mrs. Isaac acquired 101 acres of the BDF property, of which 56.32 are subject to this condemnation. *Id.* These parties are referred to collectively as "defendants" or "the landowners."

After preparing a master plan for the development of the property and obtaining the necessary parish permits, BDF built a pumping station, a sewerage treatment plant, a potable water line, and began building a levee. *See* App. 3, at 28-29; Pre-Trial Order, Uncontested Facts, No. 9; R. Vol. 4 at 843. BDF began its levee after obtaining permission from the Jefferson Parish authorities, although it did not have a 404 permit from the U.S. Corps of Engineers. App. 3, at 28-29. All this was done pursuant to contractual obligations it had with future purchasers, such as Cristina and the Isaacs to construct a levee enclosing the properties it had sold, as well as its remaining property,

and build a sewerage treatment facility, a potable water line and drainage pump station to service the property. *See* App. 3, at 28-29, Pre-Trial Order, Uncontested Facts, No. 5; R. Vol. 4 at 843.

BDF was ready, willing and able to fulfill these obligations, *see* R. Vol. 10, at 33 (Rosenblum test.); R. Vol. 11, at 75-76 (Krebs test.), until it was stopped by the Army Corps of Engineers. The levee BDF was building, which was by now ninety percent complete, was along the then-preferred alignment proposed by the Corps for part of a larger levee project, the West Bank Hurricane Protection Levee. Along that alignment, the levee would have protected the property from storm surges and allowed it to be drained, thereby making it suitable for development. *See* Pre-Trial Order, Uncontested Facts, No. 10; R. Vol. 4 at 844. In August of 1972, Congress appropriated funds to study the feasibility of creating what was to become the Jean Lafitte National Park. *See* Pre-Trial Order, Uncontested Facts, No. 11; R. Vol. 4 at 844.

On October 9, 1973 the Permit Branch of the New Orleans district of the Corps became aware that BDF was conducting dredge and fill operations which might be subject to the permitting requirements of the Rivers and Harbors Act and the Clean Water Act ("CWA"). On October 10, 1973, the District Engineer wrote to BDF advising that work on the levee should cease immediately pending a determination as to whether a permit was required. BDF, however, did not wait for that final determination but continued with its operations, insisting that no permit was necessary. *See* Pre-Trial Order, Uncontested Facts, No. 12; R. Vol. 4 at 844. On January 15, 1974, when

construction of BDF's levee was *ninety percent complete*, the Corps issued a cease and desist order prohibiting further development of the property without a permit under § 404 of the CWA. *See* App. 3, at 29; Pre-Trial Order, Uncontested Facts, No. 13; R. Vol. 4 at 845. In February 1975, the United States obtained injunctive relief against BDF, preventing further levee construction. *See United States v. Bayou des Familles Development Corp.*, No. 75-536 (E.D. La.). BDF sought an after-the-fact 404 permit in 1975. *See* App. 3, at 29-30; Pre-Trial Order, Uncontested Facts, No. 15; R. Vol. 4 at 845. However, no action on that permit occurred for many years, and what happened in the interim forms the crux of the case.

On November 10, 1978, Congress authorized creation of the Jean Lafitte National Historical Park (the "Park"), comprising an 8,600-acre "core area" and an 11,400-acre "park protection zone" ("PPZ"). The enabling statute authorized the Department of the Interior ("DOI") to revise the boundaries of the PPZ with the consent of Jefferson Parish. The statute also authorized DOI to acquire property in the PPZ, but only if state and local authorities fail to enact or enforce regulations governing the use of properties within the PPZ pursuant to guidelines to be developed by DOI. The PPZ encompassed approximately 1,000 acres of the property purchased by BDF in 1972. *See* Pre-Trial Order, Uncontested Facts, No. 16; R. Vol. 4 at 845-46.

The Park, through its director and other United States government officials, mobilized the environmental forces and successfully blocked action on the BDF permit. Its objective was clear – if the hurricane protection levee was ultimately located and built so as to leave the BDF

property unprotected, that property would be *de facto* "reserved" for the Park, such that when the Park eventually wanted title to it, it could be acquired for little or no money since the property would have no economic value. This plan was outlined in a memorandum written by the Park Superintendent. *See* Defendants' Exhibit 6.15 (Issenogle memorandum *re* use of 404 permitting process to reserve land for the Park). Still, the government would not formally file an expropriation action until October 31, 1994.

The Army Corps of Engineers was fully aware of the relevance of its decision on the levee alignment to the future of the Park. Even though in the late 1970's governmental regulation of the environment was still in its infancy and would not have customarily produced the kind of scrupulous micro-managing of wetlands that exists today, *see* Sands, R. Vol. 13, at 27-28, the Corps delayed action on the BDF permit for many years. It "studied" the issue, although it is clear that the "study" did not involve the BDF levee or development *per se*, but was more concerned with the broader question of locating the hurricane protection levee, which in turn was an inquiry, formed in large part, if not exclusively, by the Park. *See* Sands, R. Vol. 13, at 30-32, 48-49, 60-65; Defendants' Exhibit 5.10 (letter from Charles Decker *re* interdependence of decisions as to Park and BDF permit application).

Finally, on September 17, 1979, four years after its filing, the Corps denied BDF's after-the-fact permit application. But, that denial was not a "final" determination as to the fate of the BDF property. General Tom Sands, the

then commander of the Corps of Engineers who ultimately made this decision, denied the permit because at that time no decision had been made on the hurricane protection levee alignment, because the Park itself was uncertain. *See* Sands, R. Vol. 13, at 28; Gagliano, R. Vol. 10, 121. His decision was more properly viewed as a deferral of action, reserving all options to the Corps to facilitate future wetlands concerns; the main one being the Park. *Id.*, at 32. The district court (in the instant action) would later find that "[t]he evidence clearly established a reasonable probability that the landowners would have obtained the permits necessary for development absent the park project," App. 3, at 34 (citing to the testimony of General Sands, Mr. Gagliano and Mr. Krebbs), and that "the landowners have carried their burden in establishing a 'reasonable probability' that as of the date of trial they could have obtained the necessary permits. . . . " App. 3. at 42.

Even the Parish of Jefferson entered the picture, and attempted to convince the Corps to approve a hurricane protection levee alignment along the alignment proposed by BDF. On June 4, 1980, the Parish adopted a resolution endorsing a levee alignment which followed the BDF levee on those reaches affecting the property and urging the Corps to proceed with the construction of that levee as a purely local project as opposed to a private project undertaken by BDF. *See* Defendants' Exhibit 4.6. On October 7, 1980, after BDF indicated its willingness to donate the right-of-way for a levee along their original alignment, the Parish applied to the Corps for its own § 404 permit to build the levee along that alignment. *See* Pre-Trial Order, Uncontested Facts, No. 20; R. Vol. 4 at 847.

On November 20, 1980, the Corps acknowledged the Parish's concerns about right-of-way costs and advised the Parish that its permit application "might receive favorable consideration" if the levee incorporated certain water control structures. The Parish amended its permit application accordingly. *See* Pre-Trial Order, Uncontested Facts, No. 21; R. Vol. 4 at 847.

In connection with the Parish's permit application, in February, 1984 the Corps prepared a Draft Environmental Impact Statement ("Draft EIS") in which seven alternate levee alignments were considered in addition to the no-build alternative, but in those reaches affecting the Property, only two possible locations for the levee were considered: (1) the original Corps/BDF alignment, which the Corps by then designated "Alignment D," and (2) an alternate alignment, designated "Alternate Alignment Modified E" ("Alignment E"), which would place most of the subject property on the unprotected side of the levee. *See* Pre-Trial Order, Uncontested Facts, No. 22; R. Vol. 4 at 847-48. The Corps denied the Parish's permit application on June 18, 1984, and instead offered the Parish a permit for construction of a levee along Alignment E (Pre-Trial Order, Uncontested Facts, No. 23; R. Vol. 4 at 848), which would preserve the BDF property for the Park.

A public outcry for action on the levee project caused the Parish to yield to the Corps and accept the permit for the levee along Alternative E. On September 11, 1985, the Parish passed a resolution accepting a permit for the construction of a levee along the Corps' proposed alignment, Alignment E, notifying the Corps that the West Jefferson Levee District (the "Levee District") should be

the recipient of the permit. *See* Pre-Trial Order, Uncontested Facts, No. 24; R. Vol. 4 at 848. On February 25, 1986, the Corps granted the Levee District a § 404 permit for construction of a levee along Alignment E. *See* Pre-Trial Order, Uncontested Facts, No. 25; R. Vol. 4 at 848. Due to cost, the project was converted to a federal project and the Assistant Secretary of the Army (Civil Works) approved a feasibility report for construction of a levee along Alignment E tentatively on October 11, 1988 and finally on March 28, 1989. *See* Pre-Trial Order, Uncontested Facts, No. 26; R. Vol. 4 at 848. The Levee was subsequently constructed along Alignment E. *See* Pre-Trial Order, Uncontested Facts, No. 27; R. Vol. 4 at 849.

The end result and impact of the final levee alignment, which did not occur until December 18, 1990, when the Corps entered into a binding agreement with the West Jefferson Levee District for levee construction, was that the subject properties have been rendered undevelopable. The district court found that the "extensive historical documentation supplied as exhibits by the landowners established that the Corps of Engineers' decision to deny both the BDF and the Parish's permit was motivated primarily by the influence of the park." App. 3 at 38. Indeed, "the park project was *the primary motivating factor* in the denial of the section 10 and 404 permits, and in the location of the hurricane protection levee," App. 3, at 42 (citing to twelve documents and an earlier decision of the Louisiana Supreme Court[1]) (emphasis added), and that

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[1] *West Jefferson Levee Dist. v. Coast Quality Const. Corp.*, 640 So.2d 1258, 1281 (La. 1994), *cert. denied*, 513 U.S. 1083, 115 S.Ct. 736, 130 L.Ed.2d 639 (1995) ("it is absolutely clear from the

the landowners could have developed their property "but for the Jean Lafitte National Park project." *Id.* at 42.

This is because the Levee was always viewed by all concerned, including the Corps of Engineers and the Jefferson Parish government authorities, as the "growth/no growth" demarcation. *See* Evans, R. Vol. 11, at 16; Sands, R. Vol. 13, at 13; Krebbs, R. Vol. 11, at 87. The district court found it "undisputed" that the levee configuration determined the line of development, "and therefore, the subject properties were undevelopable as of the date of the final levee alignment on December 18, 1990." App. 3, at 33-34. As such, the court determined that the landowners were entitled to have their land valued at the highest and best use which was for commercial and residential development. *Id.* at 42.

But, it was not until October 31, 1994 that the government filed the instant expropriation proceeding, identifying three tracts of land that it intended to condemn for inclusion in the park.[2] The defendant landowners answered the complaint, arguing that the United States' conduct regarding the manipulation of the Hurricane

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record . . . that BDF's application for Sec. 404 and 10 permits was denied by the Corps in 1979 because of the ramifications resulting from the inclusion of landowners' land in the Jean Lafitte park protection zone").

[2] Tract 107-22 (also known as Parcels K-3 and K-4) is owned by defendant Cristina Investment Corporation, and measures 69.04 acres. Tract No. 107-24 (also known as Parcel 1-C), is owned by the Isaacs, and measures 56.32 acres. Tract No. 107-37 (also known as Parcel O), is owned by Cris Realms, Inc., and measures 2.61 acres. *See* Pre-Trial Order, Uncontested Facts, No. 1, 2, 4; R. Vol. 4 at 842-43.

Protection Levee for Park purposes over the years constituted a taking of their property such as to require a judgment of liability against the United States in the amount of the market value the property would enjoy but for the improper influence of the Park. It was stipulated by the parties that any judgment as to fair market value would be as of April 15, 1996, subject to a 6% annual increase through date of trial. In addition, and due to the government's interference and delay, the landowners requested reimbursement for taxes paid prior to the condemnation and for an award of pre-judgment interest.

Trial took place on March 17-26, 1998. On October 7, 1998, the district court entered Written Reasons for its Judgment, App. 3, and signed a Judgment reflecting these findings on October 28, 1998. App. 2 (R. Vol. 5. at 1071-73). As noted above, the district court found that the the park project was "the primary motivating factor" in the denial of the BDF section 10 and 404 permits, and in the location of the hurricane protection levee, and that the landowners could have developed their property "but for the Jean Lafitte National Park project." App. 3, at 38-42. Applying the "scope of the project rule" the district court discounted the negative effect of the park and levee on the property at issue and awarded the landowners the market value of their land taken, pursuant to a Pre-Trial stipulation as to the value of the property, if it were "developable," in the amount of $16,079 per-acre. The court also awarded severance damages based on the stipulated post-taking value of $300 per acre, if the land was unpermitable and undevelopable. The district court denied the landowners' request for reimbursement of taxes paid, for pre-judgment interest and for severance

damages for their land taken, located under the West Jefferson Hurricane and Flood Protection Levee.[3]

On December 28, 1999, the landowners filed their notice of appeal. R. Vol. 7 at 17223-24. The landowners appealed the three latter rulings, namely, the court failure to award a reimbursement of taxes, the court's failure to award pre-judgment interest, and the denial of severance damages for the land in "the levee right of way." The Government subsequently filed its own Notice of Appeal and was designated "Cross-Appellant."

The Fifth Circuit Court of Appeals rendered its opinion on May 31, 2000, reversing the decision of the district court. *See* Court of Appeal Opinion, attached as App. 1. Employing both the clearly erroneous and *de novo* standards of review, and adopting the government's argument, the Court of Appeals held that the district court erred in employing the scope of the project rule to the case at issue. That is, the government's condemnation action did not "breathe new life" into the landowners' otherwise untimely Tucker Act inverse condemnation claim against the government; that the court of federal claims' dismissal of the landowners' earlier Tucker Act claim (as untimely) was *res judicata* on the instant action; and accordingly, the landowners were only entitled to just compensation equal to the market value of their land

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[3] The Government filed a motion to amend the judgment under Fed. Rule Proc. 52(b), wherein it requested a total reconsideration of the judgment. That motion was denied on December 23, 1998. R. Vol. 7 at 1727. Also, the landowners moved for an award of attorney fees, which motion was denied, without prejudice, as premature given the instant appeal.

as of the date of the condemnation action, not at the time of the denial of the BDF permits. *Id.*

The Court of Appeals' finding that the scope of the project rule could not apply was based solely upon its conclusion that at the time the Corps's denied the BDF permit application in 1979 it could not have anticipated that its actions would drive down the price of the Landowner's land in connection with the Park project:

> . . . [t]he government's action that reduced the value of the Landowners' property (the denial of the permit application) pre-dated any concrete plans to purchase that property; and as in [*United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958)] there is no evidence that the Government's motive in denying the permit application was to drive down the value of the Landowners' property.

App. 1, at 13. The Court of Appeals reached its decision by extending *Meadow Brook* to the instant action, saddling the landowners with a specific burden to establish "bad faith" in the government's motives. *Id.*, and n. 1. The district court never expressly considered whether or not the government was in "bad faith," since that issue was not preserved by the Government in the Pre-Trial Order for trial, though the Government clearly had notice of the landowner's intention to assert the scope of the project rule in seeking increased compensation. However, the Court of Appeals refused to remand the case to the district court on this issue, finding that such a remand was not "warranted." "If any evidence of bad faith existed, the plaintiffs had every incentive to present it at trial." *Id.*, at 13, n. 1.

The Court of Appeals also refused to accept the landowners' argument that the Government had waived its sovereign immunity as to "just compensation" by filing the instant condemnation action and requesting the court to determine the true value of compensation that should be paid to the landowners. *Id.*, at 13-20. The Court of Appeals did so because it could not "square [the landowners' argument] with any temporal limiting principle," referring to the Tucker Act's six year statute of limitations, and secondly, because of its determination that the Government had not waived sovereign immunity. *Id.*

The landowners applied for a rehearing in the Court of Appeals, which application was denied on July 31, 2000. *See* App. 4. The Court of Appeals' mandate issued on August 30, 2000.

REASONS FOR GRANTING CERTIORARI

I. The Court of Appeals' interpretation of the "scope of the project" rule is contrary to well-established law applying the Just Compensation Clause.

Relying on *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958), the Court of Appeals below held that the "scope of the project" rule could not apply unless there was a showing of "bad faith" – that the Corps denial of the BDF levee permit application was intended to "drive down the price of Landowners's property and . . . [thus] facilitate the National Park Service's eventual acquisition of the land." App. 1, at 13. The panel then applied this legal standard, and concluded that "there is no evidence that the Government's motive in denying the

permit application was to drive down the value of the Landowner's property," and consequently found as a fact that there was no "bad faith" because "the primary purpose in denying the permit was to protect the Park's ecosystem." *Id.*[4] That decision is in error, and must be reversed.

Until the decision below, "bad faith" had never been considered an indispensable element of the "scope of the project" rule. The rule was first announced in the landmark case of *United States v. Miller*, 317 U.S. 369, 377, 63 S.Ct. 276, 281, 87 L.Ed. 336 (1943). In that decision the rule was confined to instances in which the United States was asked to pay for *enhanced* value caused by the project. It was not until 1970, in *United States v. Reynolds*, 397 U.S. 14, 21, 90 S.Ct. 803, 807, 25 L.Ed.2d 12 (1970), that this Court recognized that the rule applied not only to

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[4] The Court of Appeals also premised its reversal upon the finding that at the time of the permit denial, the U.S. had no definite plans to acquire the property, since the congressional statute only authorized purchase of land within the "core" zone, and purchase of land within the Park Protection Zone (PPZ) if state or local government allowed development. App. 1 at 12-13. With all due respect to the lower court, this conclusion is utterly impossible to reconcile with *United States v. Reynolds*, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970), which specifically rejected the notion that such definitive plans were a necessary component of the scope of the project rule. The appropriate test "does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the planning or original construction it became evident that land so situated would probably be needed for the public use." 397 U.S. at 21; 90 S.Ct. at 807. Here, the land was included in the PPZ, as that area was designated when the Park was formed.

enhanced values but *diminished* values resulting from the project as well. *Miller/Reynolds* was codified by the Congress in 42 U.S.C. § 4651(3):

> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

Meadow Brook was decided in 1958, after *Miller's* rule regarding "enhanced value," but before this Court's decision in *Reynolds* regarding "diminished value," and certainly before 42 U.S.C. 4651(3), which now embodies the applicable rule. Nothing in *Reynolds*, 42 U.S.C. 4651(3), nor the Fifth Circuit's decision in *United States v. 320 Acres of Land*, 605 F.2d 762 (5th Cir. 1979), adds a "bad faith" requirement. There has never been a case which allows the Government to reap the windfall of suppressing the value of land as a result of its commencement of a project, and then years later reap the benefit of that decreased value when it actually takes the land, even if the result is purely unintentional. Such would be utterly inconsistent with the public policy behind the *Miller/Reynolds* rule. "It would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . (of the construction of a government project) and then to take advantage of this depression in the price which it must pay for the property" when eventually

condemned. 1 Orgel, *Valuation Under Eminent Domain*, § 105, at 447 (2d ed.).[5]

The decision of the Court of Appeals below adding "bad faith" as a prerequisite to the application of the scope of the project rule should be reviewed. The implications of the Court of Appeals' decision are far-reaching, and threaten to eviscerate the Just Compensation Clause by allowing the government to manipulate land values through the regulatory process so long as they do not do so for the express and only purpose of avoiding the Just Compensation Clause. As the district court found, the evidence overwhelmingly established that the BDF levee permit was denied to facilitate the Park, who now seeks to acquire the property at the bargain value directly caused by the permit denial. This blueprint can, and no doubt will, be followed in future circumstances should

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[5] The error of the Court of Appeals' opinion is magnified by its rationale – a desire to impose a "temporary limiting principal" upon the scope of the project rule. *See* App. 1, at 14-16. The purpose of the *Miller/Reynolds* rule is to *delimit* the issue of compensation from purely "temporal" considerations. *Miller/Reynolds* recognizes that governmental projects take many years to accomplish (indeed here, the Levee Alignment took more than twenty years to resolve!). *United States v. 49.01 Acres of Land*, 669 F.2d 1364, 1367 (10th Cir. 1986). For this reason, courts applying the *Miller/Reynolds* rule had resisted the temptation to read a "temporal" litmus test until the rule. Instead, the rule demands that its application focus solely upon the relationship to the enhancement or diminution in value to the project at issue, regardless of the time between the commencement of that project and the ultimate condemnation. *See e.g., United States v. 12.18 Acres of Land in Jefferson County, Kansas*, 623 F.2d 131, 133 (10th Cir. 1980) ("The period of time involved is long, but the method was apparent.").

the opportunity arise. This Court has paid particular attention to the Just Compensation Clause, as it should, since the power of the government to wrest private property from a private citizen is one of the most awesome and intrusive of the governmental functions. Allowing the decision below to stand rewards the clever and crafty fashion in which that power was abused. "Bad faith" has no place in a Just Compensation Clause analysis, as this Court's decisions have made plain.

II. The Court of Appeals' decision is directly contrary to this Court's ruling limiting appellate jurisdiction.

In *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986). This Court reversed the Ninth Circuit's decision to supply a missing but crucial finding that the appellate court had felt comfortable entering because it viewed the matter as one of law. The Court held that where the district court "failed to make findings of fact essential or proper resolution of the legal question," the appellate court "should have remanded to the District Court to make those findings. "[I]t should not have simply made factual findings on its own." 475 U.S. at 714, 106 S.Ct. at 1530. This was so even though, according to Justice Stevens in dissent, in that case the appellate record contained "sufficient undisputed facts." 475 U.S. at 716, 106 S.Ct. at 1530-31 (Stevens, J. dissenting).

In *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1336 n. 15 (5th Cir. 1995), the lower court correctly summarized the *Icicle* holding as follows: "appellate court fact-finding is not allowed even for determination of *de novo* question

of law; proper procedure is to remand for correct fact finding."[6] *See also Martin v. Bedell*, 955 F.2d 1029, 1035 (5th Cir. 1992), *cert. denied*, 506 U.S. 915, 113 S.Ct. 323, 121 L.Ed.2d 243 (1992), citing *Icicle* as holding that the appellate court's review of a district court's determination of an issue is "limited to its findings of fact. . . . "

> The Supreme Court has held that when a court of appeals reviews a district court decision, it may remand if it believes the district court failed to make findings of fact essential to the decision; it may set aside findings of fact it determines to be clearly erroneous; or it may reverse incorrect judgments of law based on proper factual findings; "[b]ut it should not simply [make] factual findings on its own"

Hensley v. West, 212 F.3d 1255, 1263 (Fed. Cir. 2000), quoting *Icicle*, and citing *First Interstate Bank v. United States*, 61 F.3d 876, 882 (Fed. Cir. 1995).

Regardless of whether the Court of Appeals viewed the record of this case as wholly lacking of any evidence of "bad faith," remand was in order.[7] Lacking any constitutional power to engage in fact finding, the Court of

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[6] *Allen* reversed a pre-trial dismissal of a claim, and found that its review was akin to that appropriate for consideration of a 12(b)(6) or summary judgment motion. The suit was reinstated without a remand on that issue, but the case was remanded for further proceedings.

[7] While it is true that the question of whether a particular project is within the scope of the project for which it is being condemned is one of law and not fact, *see Reynolds, supra*, the issue of whether or not the United States was in "bad faith" is certainly properly addressed to the finder of fact. "[D]eterminations regarding motivation and intent depend on complicated inferences from the evidence and are therefore

Appeals was obliged to remand this case for the district court to pronounce the facts. It is then up to the district court, in the sound exercise of its discretion, to determine whether the evidence should be reopened, or whether a factual finding should be made on the basis of the record as it was made under the erroneous legal assumption held by all parties and the district court.[8]

Here, no "motivation" questions were asked of the expert witnesses, who were also fact witnesses to the extent that they were first hand participants in the Corps' levee alignment, because "motivation" was not an issue that was to be tried. The Pre-Trial Order did not list "bad faith" as a contested issue, and the United States never

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peculiarly within the province of the factfinder." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 125 (5th Cir. 1992). *See e.g., Click v. Copeland*, 970 F.2d 106, 114 (5th Cir. 1992) ("Sheriff Copeland's evidence of his motivation for transferring plaintiffs, along with the plaintiffs' evidence that supports a contrary inference, is fodder for the jury.").

[8] This record contains ample evidence allowing any fact finder to infer that the intention of the Corps, at the time of its decisions as opposed to its post-hoc justification of ecosystem protection, was to manipulate levee alignment to ensure that the lands at issue were deprived of any development potential precisely so that they might remain available for the park. Utterly missing from the Court of Appeals' contrary conclusion is any recognition of the undisputed fact that at the time when the decisions at issue by the Corps were made, an entirely different regulatory environment existed, and the Corps did not construe its mission, or its powers, as broadly as the witnesses who offered after the fact explanations at trial. *See* Landowners Reply Brief and Cross-Appellee Brief, at 20-22. Any attempt to determine motivation cannot be divorced from consideration of the regulatory environment in existence at the time.

asserted that it was the landowners' duty to prove "bad faith." With all due respect, the Court of Appeals overstepped its permissible bounds by depriving the district court of the right to adjudicate the "bad faith" issue either on the basis of the record as it exists or on the basis of additional evidence if the district court believes such is appropriate. Of course, the Court of Appeals' ultimate plenary power is preserved by its subsequent review of any such determinations. But, in the first instance, this adjudication must be made by the district court, assuming of course that "bad faith" is the determinative issue in this case.

III. The Court of Appeals' decision is in conflict with numerous decisions which recognize that the district court has concurrent jurisdiction to determine the date of taking in a condemnation action.

In finding that *res judicata* applied, the lower court confused a Tucker Act claim, which is subject to a time limitation, to a claim for just compensation under the Fourth Amendment, which is not subject to any time limitation. The Tucker Act is not necessary for a landowner to obtain just compensation when the government takes his property; it is only a necessary procedural statute when a taking occurs in the absence of a formal condemnation of the property. When the Court of Claims dismisses a Tucker Act claim on the basis of untimeliness, it holds nothing more than it lacks the jurisdiction to hear the claim, since the statute of limitations of the Tucker Act is jurisdictional. That dismissal has no *res judicata* effect on the merits of the dismissed claim, although in

most cases the dismissal is dispositive because no other court has jurisdiction to hear the claim.

Thus, the proper inquiry in this case is not whether the Court of Claims' earlier dismissal is *res judicata*, but instead whether the district court had the jurisdiction to hear the claims that the United States contends are nothing but Tucker Act inverse condemnation claims asserted in a district court by reconventional demand. That question has been definitively answered by the jurisprudence. The date of taking in the defense of a condemnation proceeding may predate the date of filing of the claim (or the date the United States says that it took the property), and district courts have the jurisdiction to make such a determination, even if doing so affords the same relief that might have been sought via the Tucker Act in the Court of Claims. *See United States v. Dow*, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958) (the date of taking may pre-date the government's filing of a condemnation suit, and the court hearing the condemnation suit was free to fashion compensation accordingly); *Stephenson v. United States*, 33 Fed.Cl. 63, 74 (Fed.Cl., 1994), *mandamus denied*, 66 F.3d 345 (Fed. Cir. 1995) (a "district court has the authority to decide compensation as of the date of the actual taking, even if the taking occurred prior to the filing of the declaration [of taking], and to award the value of the taken property to the owners at the time of the taking"), and *Georgia-Pacific Corp. v. United States*, 568 F.2d 1316, 1319-21 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978) (court has the authority in a condemnation suit filed by the government to determine the actual date of filing, which may pre-date the filing of the condemnation suit, and to value the property

as of the date of taking).[9] *See also, United States v. Ledford*, 202 F.3d 283 (10th Cir. 1999); 1999 WL 1244495.[10]

The Court of Appeals rejected this line of jurisprudence, and instead relied upon the Circuit Court decision in *United States v. 422,978 Square Feet of Land*, 445 F.2d 1180 (9th Cir. 1971), to support its *res judicata* holding. App. 1 at 17-21. But, that case is not applicable, and its limited holding should not be expanded and applied to the facts of this case because there is a critical difference. In *422,978 Square Feet*, the United States did not seek to have the court determine the value of the land it sought to condemn, as the United States actively did here. Instead, the United States claimed that its condemnation was pursuant to a *bona fide* navigational servitude, under which servitude the United States did not have to pay just compensation; the suit was only a method to confirm ownership in the United States, and "only a method of adjudicating the contention of the United States that the State was not entitled to compensation." 455 F.2d at 1188. Since that case did not concern a true condemnation nor

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[9] The Court of Appeals attempted to distinguish this line of cases on the grounds that the landowners could have asserted a timely Tucker Act claim, or that the federal district court hearing the "counterclaim" had concurrent jurisdiction. This attempt to distinguish hinges entirely upon the erroneous view that a Court of Claims dismissal has some *res judicata* effect on the Fourth Amendment right to just compensation, and ignores the fact that a Court of Claims dismissal means nothing more than the Court of Claims lacks jurisdiction to hear a Tucker Act suit.

[10] This case was not designated for publication, but is directly relevant to the issue at bar; it was also cited to the Court of Appeals, below, as pertinent and instructive.

did the government submit to the court's jurisdiction and request it to determine just compensation, as it did here,[11] the case is clearly distinguishable, and should not have been applied.

On separate grounds, *res judicata* cannot apply here since the Court of Claims (Tucker Act) action was dismissed for want of jurisdiction. The United States, as a sovereign, is immune from suit. When it consents to be sued, through some statutorily provided action such as a Tucker Act claim, the terms of its consent to waive its immunity define the court's jurisdiction over the claim. *United States v. Daim*, 494 U.S. 569, 608, 110 S.Ct. 1361, 1368 (1990). A "statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms." *Id.* (citing to *United States v. Mottaz*, 476 U.S. 834, 841, 106 S.Ct. 2224, 2229, 90 L.Ed.2d 841 (1986) and *Block v. North Dakota, ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 287, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.")).

The dismissal in the Court of Claims was granted upon the government's Summary Judgment Motion

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[11] *See* Complaint, at 1 ("This is an action . . . for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest."), and 2 ("WHEREFORE, plaintiff demands judgement that the property be condemned and that just compensation for that taking be ascertained and awarded, and for such other relief as may be lawful and proper.").

under Fed. R. Civ. Pro. 56 *on jurisdictional grounds,*[12] the Court of Claims treating the motion as a Motion to Dismiss under Fed. R. Civ. Pro. 12(b):

> While the defendant has captioned its motion as one for summary judgment . . . it will be treated as a motion to dismiss. . . . The Defendant argues that the claims are time barred, *i.e.*, the court lacks subject matter jurisdiction to entertain the suit. Such jurisdictional challenges are properly raised by a motion to dismiss- . . . not a motion for summary judgment. . . . Alternatively, defendant argues that [the] complaint does not "state a takings claim against the United States," . . . but does not rely on evidence outside the pleadings. This should also be treated as a motion to dismiss.

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[12] The government argued in the instant appeal that the Court of Claims suit was dismissed "on the merits by a court of competent jurisdiction." U.S. Brief, at 31. But this was not the position it took in the Court of Claims. There, the U.S. sought to have plaintiff's suit dismissed by means of a Summary Judgment Motion under Fed. R. Civ. Pro. 56 on jurisdictional grounds: "The government now moves to dismiss based upon jurisdictional grounds – state of limitations grounds – and failure to state a claim." U.S. Motion for Summary Judgment, at 3. Attached as Exhibit 1 to the Landowner's Post-Argument Brief, below. In the Court of Claims, the government recognized that: "Timeliness under the six-year statute [of limitations provided by the Tucker Act] is a jurisdictional prerequisite to suit," citing *Sociano v. United States*, 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957), and other cases. *Id.* at 15. They further argued that: "The plaintiffs have the burden of establishing that this Court has jurisdiction to adjudicate their claims. . . . In this case, plaintiffs have not met this burden." *Id.* at 16.

Court of Claims Opinion, February 23, 1996, at 1, n.1. Attached as Exhibit 2 to the Landowner's Post-Argument Brief, below. The Court finally concluded that because "plaintiffs filed suit beyond the jurisdictional limits set by 28 U.S.C. § 2501" their suit must be dismissed. *Id.* at 8, 10.

The Landowners appealed that decision, and the Court of Federal Claims affirmed. *Bayou des Familles v. United States*, 130 F.3d 1034, 1040, n.7 (Fed. Cir. 1997) ("We conclude that the trial court could properly treat the Government's motion as a motion to dismiss under RCFC 12(b) – whether viewed as a bar to the grant of a remedy or as a bar to the court's exercise of jurisdiction over the cause, the result is the same."). Since the Court of Claims dismissed the suit on the grounds of untimeliness, which was a jurisdictional ground, the jurisdiction of the Court of Claims never attached, and thus its decision cannot be *res judicata* on the instant suit. *See Nilson v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) ("dismissals for want of jurisdiction are not decisions of the merits, while those based on limitations are on the merits" for *res judicata* purposes.").[13] For *res judicata* to apply, a determination on the merits must have been reached by a court of competent jurisdiction. *Id.* at 559; *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987). Furthermore, for *res judicata* to apply, "the same cause of action

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[13] Likewise, the instant action is not one which the landowners could have asserted at the time of their Tucker Act claim (in considering all possible claims that the landowners "could have been brought" at the time, or which are forever barred by *res judicata*), since the instant suit is a direct condemnation by the United States Government. *See, e.g., Nilson, supra*, 701 F.2d at 562-63.

must be involved in both cases," *Shoaf*, 815 F.2d at 1051, and here, the same claim is not asserted; this is the government's voluntarily filed condemnation suit; not a second attempt by the landowners to assert a cause of action for appropriation.

The Court of Appeals voiced concerns regarding the "temporal limiting principles" behind actions under the Tucker Act. App. 1 at 14-16. Certainly, there are principles of finality in litigation, which is why statutes of limitation are created. But, allowing a landowner to defend a condemnation claim by challenging the date of taking does not disturb any repose that the United States is legitimately entitled to receive. If the United States never condemns the land, the Tucker Act's statute of limitation gives it repose. But, when the United States actively places value at issue, what right does it have to assert that the Fourth Amendment right to just compensation to the full extent of the loss is tempered by some time limitation?

Finally, the landowners do not expand the "scope" of the government's petition by claiming compensation for more land than the government actually took. Instead, they merely do what is permissible; to demand just compensation for the taking. To allow the government to limit the "scope" of its damages does nothing but obliterate the Just Compensation Clause of the United States Constitution, for it allows the government to limit the amount of compensation it will pay, which is exactly what the government is trying to do in this case.

CONCLUSION

This Court should grant certiorari because of the grave implication of the decision below on the correct and proper application of the Due Process Clause.

Respectfully submitted,

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APPENDIX

1. Opinion, United States Court of Appeals for the Fifth Circuit, entered May 31, 2000 .....App. 1

2. Judgment Determining Compensation, United States District Court, Eastern District of Louisiana, entered October 28, 1998.....App. 24

3. District Court Reasons for Judgment, entered on October 7, 1998.....App. 27

4. Denial of Petition for Rehearing, United States Court of Appeals for the Fifth Circuit, entered June 31, 2000 .....App. 46

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30187

UNITED STATES OF AMERICA;
Plaintiff-Appellee-Cross-Appellant,

v.

LAND, ET AL.,
Defendants

CRIS REALMS, INC.,
Claimant-Appellant-Cross-Appellee,

UNITED STATES OF AMERICA;
Plaintiff-Appellee-Cross-Appellant,

v.

LAND; ET AL.,
Defendants,

RONALD J. ISAAC, ET UX: BETTY PERRIN ISAAC,
Defendants-Appellants-Cross-Appellees,

UNITED STATES OF AMERICA;
Plaintiff-Appellee-Cross-Appellant,

v.

LAND; ET AL.,
Defendants

CRISTINA INVESTMENT CORPORATION;
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

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Before DAVIS, CYNTHIA HOLCOMB HALL,* and SMITH, Circuit Judges. CYNTHIA HOLCOMB HALL, Circuit Judge:

To resolve the instant case we must determine whether a landowner's damages in a condemnation suit can be adjusted to reflect a prior regulatory taking by the Government where the landowner's efforts to be compensated for that regulatory taking via a separate inverse condemnation suit have already failed. We answer that question in the negative, holding that a landowner who has lost an inverse condemnation claim may not use the compensation phase of subsequent condemnation proceedings to make an "end run" around res judicata and the Tucker Act's statute of limitations. We affirm in part, reverse in part, and remand for further proceedings.

I.

The United States filed the instant condemnation suit to acquire the land in question in 1994. But in order to understand the unusual nature of this case it is necessary to recount a sequence of events that began more than two decades earlier. In August of that 1972, Congress appropriated funds to study the feasibility of creating a national park in the Barataria Marsh, a wetlands area

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* Senior Circuit Judge, U.S. Court of Appeals, Ninth Circuit, sitting by designation.

located along the Mississippi River. That same month, the Bayou Des Familles Development Corporation ("BDF") acquired 2,182.62 acres of land in the marsh. BDF planned to develop residential communities on the land, so it subdivided and sold the land to various parties. Among those who presently own land formerly owned by BDF are the three Appellants-Cross-Appellees in this case: Cris Realms, Inc., Ronald J. and Betty Perrin Isaac, and Cristina Investment Corporation (collectively "Landowners").

In order to make the larger property suitable for residential development, BDF planned to construct a levee, which would allow for drainage of the wetlands and protect the property from storm surges. BDF began construction of the levee without obtaining construction permits from the Army Corps of Engineers ("Corps"). In October of 1973, the Corps advised BDF to cease work on the levee pending a determination by the Corps of whether the permits were required by 33 U.S.C. § 1344 and 33 U.S.C. § 403. BDF proceeded with the levee construction anyway, prompting the Corps to issue a cease and desist order in January of 1974, after 90 percent of the levee had been completed. BDF was subsequently fined $25,000 and required to obtain the requisite permits from the Corps before continuing construction. BDF filed a permit application in April of 1975 and a draft environmental impact statement in June of 1975.

The Corps indicated an inclination to deny BDF's permit application in December of 1975, citing, inter alia, strong opposition from the Environmental Protection Agency, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the State Parks and Recreation

Commission, and the State Planning Office. The Corps noted concerns expressed in BDF's environmental impact statement that draining the land for development would decimate the habitat of many species of wildlife, including that of an endangered alligator. Over the next several years, BDF's permit application remained in a state of limbo because of uncertainty concerning the construction of a nearby hurricane-protection levee and the status of the proposed national park in the Barataria Marsh. Finally, in 1979, after Congress created Jean Lafitte Park in the marsh area, the Corps denied BDF's permit application. In denying the permit, the Corps pointed to several aforementioned general environmental concerns along with fears that the levee would adversely impact the new Park. The Corps also noted public and governmental agency opposition to the construction of the levee.

The congressional legislation creating Jean Lafitte Park established a 8,600-acre "core area," which would comprise the park itself, and a 11,400-acre "park protection zone." The statute authorized the Department of the Interior to acquire land within the park protection zone, but only if state and local authorities failed to enact or enforce protective regulations governing the use of land within the zone. All three of the parcels subject to condemnation in this case fell within the park protection zone.

On November 2, 1979, BDF filed suit in federal district court to enjoin the Corps' denial of the permit application. *See Bayou des Familles Dev. Corp. v. United States Corps of Eng'rs*, 541 F. Supp. 1025 (E.D. La. 1982). In this

suit, BDF alleged, inter alia, that the permit denial constituted an uncompensated taking. The district court dismissed this claim for lack of jurisdiction, noting that the Court of Claims would have exclusive jurisdiction over such a claim under the Tucker Act, 28 U.S.C. § 1491. *See id.* at 1042.

BDF filed an inverse condemnation suit in the United States Claims Court on July 25, 1991.[1] That suit was joined by Landowners Ronald and Betty Isaacs. The court dismissed the suit as time-barred by the Tucker Act's six-year statute of limitations. *See Bayou des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1037 (Fed. Cir. 1997). The Federal Circuit affirmed on this basis, holding that any takings claim had become ripe in 1979, and therefore must have been filed by 1985. *See id.* at 1040. The other Landowners in this case filed an inverse condemnation suit on February 21, 1995, and that suit was similarly dismissed as time-barred. *See Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571, 579-80 (1998), *appeal dismissed*, 155 F.3d 570 (Fed. Cir. 1998).

Related litigation proceeded in the Louisiana state courts as well. In 1986 Jefferson Parish sought and obtained permission from the Corps to build a hurricane-protection levee, proposing a location that differed from that proposed by BDF. BDF and Landowners refused to provide land for the Corps-approved levee, which would have left most of Landowners' land on the unprotected

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[1] In 1982 the United States Claims Court became the successor to the United States Court of Claims's original jurisdiction. In 1992 the United States Claims Court became the United States Court of Federal Claims.

side of the levee (and hence, unsuitable for residential development). Accordingly, the West Jefferson Levee District filed condemnation suits against Landowners, seeking to acquire (for $500 per acre) 16.16 acres from Landowner Cris Realms, Inc., 19.56 acres from Landowner Cristina Investment Corp., and 44.96 acres from Landowners the Isaacs. Landowners sought much higher compensation for their land, arguing that the District should pay them what their land would be worth were it suitable for development. The trial court agreed and a court of appeals affirmed. The Louisiana Supreme Court reversed, holding that Landowners were unable to develop their property because of "the property's location inside of the park protection zone of Jean Lafitte Park and because of the growing national policy toward the more stringent preservation of wetlands." *West Jefferson Levee Dist. v. Bayou Des Familles Dev. Corp.*, 640 So.2d 1258, 1284 (La. 1994). The court remanded for a recalculation of damages based on the undevelopable value of the land.

Pursuant to 16 U.S.C. § 230a(c), the Federal Government could only acquire land in the park protection zone if the parish governments proved unwilling to enact land-use regulations that would adequately protect the ecosystem of the Park's core. In 1994, after unsuccessfully attempting to convince Jefferson Parish to enact such land-use regulations, the National Park Service filed condemnation complaints seeking to acquire the "park protection zone" properties at issue in this case. The Park Service valued the property at approximately $300 per acre, based on the land being unsuitable for residential development. Landowners insisted that they should be

compensated for the value of the land based on an assumption that all the land would be suitable for such development. This assumption yielded an appraisal of approximately $16,000 per acre.

After a bench trial, the district court sided with Landowners on the valuation question, determining that Landowners were entitled to receive compensation based upon the value of the land if suitable for development. The court determined that because the Government's actions in denying the permit rendered the condemned property unsuitable for development, the Government was liable for what that land would have been worth had the levee been built at the location proposed by BDF.

The district court also refused to award severance damages for property that was in the right of way of the (approved) hurricane-protection levee, and which had been condemned by the state Levee District. But the district court did award Landowners severance damages to compensate them for the purportedly reduced value of land on the protected side of the hurricane-protection levee. The district court ordered such damages sua sponte. The district court denied Landowners' request for prejudgment interest and reimbursement of taxes paid between the alleged actual interference with their enjoyment of the property and Landowners' receipt of compensation.

Landowners appealed the denial of prejudgment interest and reimbursement for taxes paid. Landowners also appealed the district court's refusal to award severance damages for land in the hurricane-protection levee's right of way. The Government cross-appealed the district

court's decision to base compensation on the value of the condemned land if suitable for development and the district court's award of severance damages for the ostensible reduction in value of the land on the protected side of the hurricane-protection levee.

II.

We review the district court's factual findings for clear error and its legal conclusions de novo. *See United States v. 50.822 Acres of Land*, 950 F.2d 1165, 1168 (5th Cir. 1992). The district court's valuation methodology "must be based upon principles that reflect sound reasoning." *Margate Shipping Co. v. M/V JA Oregon*, 143 F.3d 976, 990 (5th Cir. 1998).

III.

We first address our attention to the primary issue raised in the Government's cross-appeal. It is undisputed that on the date the Government condemned their land, the Landowners could no longer have prevailed in an inverse condemnation suit to recover damages resulting from the Corps' refusal to allow BDF to construct a levee at its desired location. Such a suit would have been precluded by res judicata and time-barred under the Tucker Act, 28 U.S.C. § 2501. *See Bayou des Familles Dev. Corp.*, 130 F.3d at 1040; *Cristina Inv. Corp.*, 40 Fed. Cl. at 579-80; *see also Mathis v. Laird*, 457 F.2d 926, 927 (5th Cir. 1972) (holding a dismissal on statute of limitations grounds to be a decision on the merits for the purposes of res judicata). Nevertheless, the district court essentially

concluded that the Government's condemnation proceeding breathed new life into the Landowners' expired inverse condemnation claims. Specifically, because one federal instrumentality (the Corps) had denied the levee construction permit, and another federal instrumentality (the National Park Service) had condemned the land, the condemnation suit provided the Landowners with a second opportunity to obtain the damages they sought in their earlier Tucker Act suits. The district court's necessary calculation of damages due in the condemnation suit would become the method by which the Landowners would get what they were otherwise no longer entitled to receive. We believe the district court erred in reaching that conclusion.

The district court relied on the scope-of-the-project rule in determining that the Government could be liable for the earlier permit denial. In *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979), we succinctly articulated the scope-of-the-project rule:

> If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project.

Id. at 781-82. As we made clear at the time, the scope-of-the-project rule is also applicable to "depreciations in value . . . attributable to the Government project for which property is taken." *Id.* at 787 n.32; *see also* 42 U.S.C. § 4651(3) (codifying the scope-of-the-project rule with respect to any "decrease or increase in the fair market

value of real property prior to the date of valuation caused by the public improvement for which such property is acquired"). Thus, in some instances where the government initiates a project that drives down the value of neighboring lands, if the government subsequently condemns those lands, it will have to pay the landowners the lands' (higher) pre-project value. For example, suppose the government fully intends to build a five square-mile landfill in what is presently a residential neighborhood. The government initially condemns one square mile and re-zones it for landfill use. Presumably, such an action would lower the value of adjoining lands. The government could then pay less for the additional four square miles than what it would have had to pay if it had condemned the five square miles in one fell swoop. The scope-of-the-project rule dictates that the compensation due from such a piecemeal condemnation will be the same as it would have been had the condemnation occurred all at once. Where it applies, the scope-of-the-project rule could theoretically allow a landowner to recover at the compensation stage of a condemnation suit what he would no longer be able to recover via a Tucker Act inverse condemnation suit.

In *320 Acres* we pointed to three factors relevant in determining whether to apply the scope-of-the-project rule: (1) Whether it was foreseeable that the project would be enlarged to include the later-condemned property; (2) The length of time between the initiation of the project and the condemnation of the later-condemned property; and (3) The nature of governmental representations about the final borders of the project at the time that project was originally announced. *See 320 Acres*, 605 F.2d

at 791-92. In applying those factors to that case, we indicated that an 18-year lapse of time between the initiation of the project and the condemnation of the land in question might be so long as to render the scope-of-the-project rule inapplicable to the later condemnations. *See id.* at 797. We further held that a mere government authorization to purchase land, unaccompanied by an allocation of funds for that purpose, "hardly evinces a firm commitment [to subsequent condemnations], especially when the Government has permitted certain lands within numerous other National Parks to remain privately owned." *Id.*

In United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir. 1958), the Second Circuit articulated a further consideration that is instructive in helping us determine whether the scope-of-the-project rule applies to the instant case. In *Meadow Brook* the United States filed a complaint seeking to condemn certain parcels in order to enlarge an airfield. The court confronted a valuation dispute over whether compensation should be based on the land in question being re-zoned for industrial use or its present (lower-value) residential use. *Meadow Brook* had applied for a re-zoning, but that application had been opposed successfully by the Air Force on the ground that industrial development on the land in question would create flight hazards for planes landing at the airfield. *Id.* at 46. The court held that absent a showing that "the government's sole motive in resisting the change in zoning was to depress the market value of the property which it then intended to condemn," it would not exclude the Air Force's opposition to the re-zoning as a factor

suggesting that the land should be valued based on residential zoning. *Id.* at 45. Where the record contained no allegation of bad faith by the government, it was inappropriate to allow the landowners to benefit from an improbable prospective re-zoning, even if the government's action was the primary obstacle to the re-zoning.

Applying these considerations to the facts at issue here, we hold that the scope-of-the-project rule is inapplicable. As a threshold matter, we must define the "project" and its initiation date. For scope-of-the-project purposes, the relevant project is the establishment of Jean Lafitte National Park. Congress created that Park in 1978. Recall that Congress did not initially authorize the National Park Service to buy Landowners' property, or any other property in the 11,400-acre park protection zone. Rather, such purchases would only be authorized if the relevant state and local government agencies failed to enact land-use regulations that would adequately protect the Park's core.

In order for the scope-of-the-project rule to apply to the instant case, the record would have to show that when the Corps denied BDF's permit application in 1979, it anticipated that the denial would drive down the price of Landowners' property and that this would facilitate the National Park Service's eventual acquisition of the land. We believe the record belies any such conclusion. To the contrary, it is clear that at the time the Corps denied the BDF's permit application, there were no concrete plans to purchase any land in the park protection zone. Those plans to acquire lands did not begin until 1986, and the Government did not file condemnation complaints against Landowners' property until 1994. Thus, there was

a sixteen-year lapse between the initiation of the project in question and the acquisition of Landowners' property; the Government action that reduced the value of Landowners' property (the denial of the permit application) pre-dated any concrete plans to purchase that property; and, as in *Meadow Brook*, there is no evidence that the Government's motive in denying the permit application was to drive down the value of Landowners' property.[1] Rather, the record clearly indicates that the Corps' primary purpose in denying the permit was to protect the Park's ecosystem. On these facts, compensation should be based on the value of the land at the time of the condemnation, regardless of prior Government actions that rendered the land less valuable than it might have been in the absence of prior Government activities. It was error for the district court to value Landowners' property as if the proposed BDF levee had been completed.

At oral argument and in supplemental briefing, Landowners presented an additional theory supporting the district court's valuation determination. Landowners assert that although their inverse condemnation suits to recover compensation for the Corps' denial of the levee permit were dismissed by the Federal Circuit as time-barred, these decisions do not preclude them from recovering the same damages in the present condemnation litigation. Landowners argue that a government condemnation action waives sovereign immunity as to all compensation issues relating to property identified in the

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[1] No remand on the bad-faith question is warranted. If any evidence of bad faith existed, the plaintiffs had every incentive to present it at trial.

condemnation complaint. There are several reasons why we reject Landowners' effort to re-litigate an expired inverse condemnation suit "via the back door."

A fundamental reason for rejecting Landowners' novel theory is our inability to square it with any temporal limiting principle. If the federal government were to have built a dam in 1900, and this dam lowered property values for nearby landowners, the landowners would be able to recover damages for this alleged taking if the federal government decided in the year 2000 that it ought to condemn their land. Property law will not bear continuing governmental liability of that nature. The federal government and federal courts need not revisit every possible ancient inverse condemnation claim when they decide to condemn a piece of property. The animating principles behind the Tucker Act's six-year statute of limitations are consistent with venerable property rules that stress the importance of finality, clarity of title, and the extinguishment of claims by owners who sleep on their rights. *See generally Hohri v. United States*, 586 F. Supp. 769, 786 (D.D.C. 1984) ("The length of [the Tucker Act's] statute of limitations is a product of a legislative weighing of competing claims of fairness – the need of plaintiffs for a reasonable amount of time within which to present their claims, and the right of defendants to be free of stale claims. Statutes of limitations also protect both the Court and the defendant from cases where the loss of evidence – by death or disappearance of witnesses, fading memories, or disappearance of documents – may frustrate the search for truth."), *adopted after the Supreme Court vacated and remanded on other grounds* by 847 F.2d 779 (Fed. Cir. 1988); Thomas W. Merrill, *Property*

Rules, Liability Rules, and Adverse Possession, 79 Nw. U.L. Rev. 1122, 1128-33 (1984) (describing the necessity of adjudicating claims before evidence has been lost, the desirability of quieting titles, the interest in discouraging owners from sleeping on their rights, and third party reliance interests as the traditional justifications for transferring title to an adverse possessor after the statute of limitations has run); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601, 604-12 (1998) (discussing Blackstone's consequentialist motivations for treating existing distributions of property as beyond question despite his own doubts about whether "current claimants really have any solid foundation for the things they claim"). To grant property owners an unlimited right to litigate (or re-litigate) any claims that the government previously interfered with their property rights would also run aground of the rule that a property owners' right to receive just compensation is not absolute, but depends on his compliance with the law's unambiguous procedures for obtaining such compensation. *See Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) ("The simple fact is that we have no jurisdiction to address the merits of takings claims where Congress has provided a means for paying compensation for any taking that might have occurred."). As the Supreme Court had noted, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). After the property owner has availed itself of that process and been denied compensation, further litigation must allege that the process

for receiving compensation, the Tucker Act in this case, is not a "reasonable, certain and adequate provision" for obtaining compensation or that the adequate procedures were not followed. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999); *Williamson County*, 473 U.S. at 194. Quite sensibly, Landowners do not argue that the Tucker Act is a constitutionally inadequate means for obtaining compensation. The Federal Circuit's dismissals of Landowners' Tucker Act claims are therefore res judicata.

Second, Landowners' argument that the federal government waives sovereign immunity as to all possible inverse condemnation counterclaims involving the same land when it files a condemnation suit is inconsistent with the Supreme Court's clearly-articulated decisions holding that waivers of sovereign immunity must be narrowly construed. *See, e.g., Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("We have frequently held, however, that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign. Such a waiver must also be 'unequivocally expressed in the statutory text.' ") (citations omitted); *see also Narramore v. United States*, 960 F.2d 1048, 1051 (Fed. Cir. 1992) ("The condemnation statutes do not waive sovereign immunity for property owners to institute counterclaims or suits seeking damages for takings beyond the scope of the Government's filing."). Landowners do not point us to any text in the federal condemnation statutes or rules that permit a landowner to recover compensation for prior regulatory takings that reduced the value of the property in question. The Government's sovereign immunity therefore defeats a claim

alleging that Landowners' compensation in condemnation should be adjusted upward to reflect what the land would have been worth in the absence of a prior regulatory taking.

Confronting an analogous set of circumstances, the Ninth Circuit reached a result consistent with the one we reach today. In *United States v. 422,978 Square Feet of Land*, 445 F.2d 1180 (9th Cir. 1971), the court considered a case in which the federal government took physical possession of submerged lands owned by California in 1940. In 1955, the federal government filed a condemnation suit to obtain title to the land already in its possession. The government then sought dismissal of its condemnation complaint with prejudice to the state's ability to recover compensation in light of California's failure to sue within the Tucker Act's six-year statute of limitations. California argued that, notwithstanding the statute of limitations, it was still entitled to receive compensation for the value of the submerged land in light of the federal government's condemnation suit. The Ninth Circuit rejected this argument, holding "that the running of the Tucker Act period of limitations precluded the State from recovering in the condemnation proceedings." *Id.* at 1188. Thus, where a landowner could have successfully sought compensation under the Tucker Act but failed to do so, the initiation of government condemnation proceedings to acquire that same land did not create a second opportunity to recover compensation for the government's prior inverse condemnation via the compensation-determination process.

In arguing to the contrary, Landowners rely heavily on a footnote in a recent decision by a judge on the Court

of Federal Claims. Construing *Narramore*, that court wrote:

> The statement in *Narramore v. United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992) that condemnation statutes do not waive the government's immunity from property owners' "counterclaims" clearly does not prohibit a defendant from alleging an earlier date of taking or a greater compensation amount than deposited with the court at the time of the declaration.

Stephenson v. United States, 33 Fed. Cl. 63, 75 n.21 (1994). Whatever the merits of this footnote, the *Stephenson* decision certainly does not contemplate the situation at hand, where Landowners have already had their separate inverse condemnation suits dismissed as time-barred. *See id.* at 81 ("Indeed, the federal courts of appeals uniformly have held that a district court lacks jurisdiction to entertain a true counterclaim in a condemnation proceeding, that is, a separate freestanding claim that otherwise could be asserted independently in another proceeding [in the Court of Federal Claims]."). Landowners provide us with no reason why the Court of Federal Claims could not have considered their Tucker Act claims had they been timely filed.

Landowners also cite *Georgia-Pacific Corp. v. United States*, 568 F.2d 1316 (Ct. Cl. 1978), where the Court of Claims confronted "what should be done when a claimant brings suit in this court for an inverse condemnation of land interests, and not long thereafter the Government files a District Court condemnation action involving the very same interests but asserting a later taking-date." *Id.* at 1318. The court held that the district court had the

authority to determine which of the two parties' proposed date of taking was correct and to value the property as of that date. *See id.* at 1319. The court also suspended any further Tucker Act proceedings pending the district court's determination of the taking date.[2] In *Georgia-Pacific*, unlike in the instant case, the property owners' inverse condemnation suit would have been timely under the Tucker Act. Thus, in making a determination as to which of two competent courts should adjudicate a common question at issue in two separate lawsuits, the court deferred to the district court. Absent the viability of both the inverse condemnation and condemnation suits, we do not read the Georgia-Pacific decision as allowing a district court to consider the equivalent of a time-barred and jurisdictionally barred Tucker Act counterclaim. The court implied as much in its extended discussion of the unusual procedural posture of that dispute:

> The condemnation proceeding covers several parties in addition to Georgia-Pacific. We thus

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[2] As the *Georgia-Pacific* court made clear, the Court of Claims was not transferring the litigation to the district court, only suspending "further proceedings in this litigation until the District Court had decided when the date of taking occurred, or has refused to inquire whether a time prior to March 5, 1976, is the correct one." 568 F.2d at 1319. After the district court made its determination with respect to the common issue in the two suits, the inverse condemnation aspects of the suit would have been adjudicated by the Court of Claims alone. In the case at bar, the Court of Federal Claims is similarly the only court with jurisdiction to consider the inverse condemnation claim, but *res judicata* and the Tucker Act's statute of limitations now deprive it of the authority to do so.

> have only part of the eminent domain litigation in this court. . . . The nub of it is that only the District Court is in a position to decide all phases of the litigation in the event Georgia-Pacific's claim of an early taking should be rejected.
>
> Moreover, a single tribunal is better able than two or more independent courts to direct and handle variant and alternative claims all bearing on the same situation. Sometimes such unified treatment is precluded by jurisdictional statutes, but where it is not – as we think is true of this instance – it is ordinarily better to centralize the proceedings in the tribunal which has the widest scope to handle all the parts of what is in commonsense one unified piece of litigation.

Id. at 1321. These considerations simply are not implicated where one tribunal has already dismissed a claim as time-barred and the district court confronts an effort to resuscitate a claim arising out of the very same governmental action. The judicial efficiency considerations that warranted a stay of Court of Claims proceedings pending a district court determination in *Georgia-Pacific* here warrant a district court's refusal to revisit the facts underlying Landowners' already adjudicated inverse condemnation claims.

In light of Landowners' failure to pursue their Tucker Act remedies in a timely manner, they may not argue in the condemnation proceedings that they should be compensated based on the value of their property as if

suitable for residential development.[3] On remand, the district court should determine the value of Landowners' property in its current, unsuitable for development, state.

IV.

The Government also argues that the district court erred by awarding severance damages to Landowners Cris Realms and Cristina Investment for damage to property on the protected side of the hurricane-protection levee. We agree.

Although Landowners did not request such severance damages below, the district court awarded damages to compensate them for the partition of their land that occurred as a result of the construction of the hurricane-protection levee. The hurricane-protection levee ran through Landowners' property, presumably making it more difficult to travel from one side of the property to the other. The district court apparently concluded that but for the Corps' denial of the BDF levee permit application, the hurricane-protection levee would not have been built, so Landowners' property would not have been partitioned.

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[3] For the same reasons, we affirm the district court's determinations that Landowners are entitled to neither reimbursement of taxes paid on the properties since the date of the alleged inverse condemnation nor prejudgment interest. Landowners' proper remedy for recovering such damages were Tucker Act inverse condemnation suits. Because such suits have already been dismissed as untimely by the Federal Circuit, res judicata and a lack of jurisdiction bar us from revisiting those claims for damages.

Any severance damages resulting from the construction of the levee are not compensable in the present proceedings because they were not caused by the Government's condemnation of the properties in the instant suit. Landowners' opportunity to acquire severance damages as a result of the hurricane levee came and went in the state court condemnation litigation that culminated in *West Jefferson Levee Dist. v. Bayou Des Familles Dev. Corp.*, 640 So.2d 1258, 1284 (La. 1994). It was, after all, the state government, not the federal government, that built the hurricane-protection levee. Landowners' argument that severance damages are due because the Corps' refusal to permit the BDF levee resulted in the hurricane-protection levee's placement is unpersuasive for the reasons stated above.

V.

Landowners also appeal one of the district court's rulings with respect to severance damages. The district court denied Landowners' request for severance damages to lands underneath the hurricane levee. Although that land has been condemned by the State of Louisiana, and Landowners received payment from Louisiana for those lands, Landowners sought severance damages for value allegedly taken by the United States prior to Louisiana's expropriation. The district court held that because "the land underlying the levee had been expropriated by the West Jefferson Levee District before the condemnation proceedings herein, landowners are not entitled to severance damages on that portion." This reasoning was sound. *See United States v. Dow*, 357 U.S. 17, 20-21 (1958) (holding that only the owner on the date of the taking is

entitled to receive just compensation.). For the aforementioned reasons, Landowners can only recover severance damages resulting from the condemnation itself, not from any prior Government action. Thus, if the condemnation caused any severance damages to the land underneath the levee, the State of Louisiana, which owned that land at the time of the condemnation, would be the proper recovering party.

VI.

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and remand for a recalculation of just compensation consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CIVIL ACTION
	*	NO. 94-3327
v.	*	C/W 94-3519 & 94-3540
2.61 ACRES OF LAND, ETC.	*	SECTION: "S"

* * *

JUDGMENT DETERMINING COMPENSATION

(Filed Oct. 28, 1999)

For the reasons set forth in the Court's Reasons for Judgment relative to the amount of just compensation for the takings in Tract Nos. 107-37 ("Cris Realms"), 107-22 ("Isaac") and 107-24 ("Cristina") in the captioned actions, entered October 7, 1998.

IT IS ORDERED that there be judgment in favor of defendants Cris Realms, Inc., et al., and against plaintiff, the United States of America, in the full and true amount of ONE HUNDRED SIXTY THREE THOUSAND SIX HUNDRED SIXTY SIX DOLLARS AND TWENTY CENTS ($163,666.20) as just compensation for the taking of fee simple title to the lands in Tract No. 107-37 (2.61 acres), exclusive of minerals and subject to existing easements for public roads and highways, public utilities, railroads and pipelines, as well as for severance damages to the remainder (6.32 acres).

IT IS FURTHER ORDERED that there be judgment in favor of defendants Ronald J. Isaac, et al., and against

plaintiff, the United States of America, in the full and true amount of ONE MILLION FORTY FOUR THOUSAND ONE HUNDRED SEVENTY TWO DOLLARS AND EIGHTY CENTS ($1,044,172.80) as just compensation for the taking of fee simple title to the lands in Tract No. 107-22 (56.32 acres), exclusive of minerals and subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

IT IS FURTHER ORDERED that there be judgment in favor of defendant, Cristina Investment Corporation, and against plaintiff, the United States of America, in the full and true amount of ONE MILLION FOUR HUNDRED THIRTY THREE THOUSAND FIVE HUNDRED EIGHTY TWO DOLLARS AND FORTY CENTS ($1,433,582.40) as just compensation for the taking of fee simple title to the lands in Tract No. 107-24 (69.04 acres), exclusive of minerals and subject to existing easements for public roads and highways, public utilities, railroads and pipelines, as well as for severance damages to the remainder (8.42 acres).

IT IS FURTHER ORDERED that title to the estates described in the Schedules B attached to the complaints in the captioned proceedings will vest in the United States upon payment of the foregoing amounts of just compensation into the registry of the Court at which time the Court will enter an order vesting such title.

IT IS FURTHER ORDERED that the defendants' request for attorney fees shall be determined by further proceedings to be conducted by the magistrate judge.

New Orleans, Louisiana, this 28 day of October, 1998.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT
JUDGE

Approved as to form:

EDDIE J. JORDAN, JR.
UNITED STATES ATTORNEY

/s/ Glenn K. Schreiber
GLENN K. SCHREIBER
Assistant United States Attorney

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CRIS-REALMS INC., ET AL.

/and/

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES	CIVIL ACTION
VERSUS	NO. 94-3327
2.61 ACRES OF LAND	SECTION "S"

REASONS FOR JUDGMENT

(Filed Oct. 6, 1998)

The United States, through the National Park Service, filed a complaint on October 31, 1994, pursuant to Rule 71A of the Federal Rules of Civil Procedure, condemning three separate tracts of land for inclusion in the Jean Lafitte National Historic Park, Tract Numbers 107-22, 107-24, and 107-37, which measure 56.32 acres, 69.04 acres, and 2.61 acres, respectively. The condemned land is located on the West Bank of the Mississippi River in the Parish of Jefferson, approximately midway between New Orleans and Barataria, Louisiana.

The owners of the condemned land do not object to the condemnation itself, but dispute the amount of just compensation to which they are entitled pursuant to the Fifth Amendment of the United States Constitution. Accordingly, the owners filed Notices of Appearance pursuant to Rule 71A(e) of the Federal Rules of Civil Procedure. The landowners moved for summary judgment, this Court denied that motion, and the case proceeded to trial before the Court without a jury.

Historically, in 1972, Bayou des Familles Development Corporation ("BDF"), a real estate investment company formed by a group of landowners to develop

residential subdivisions along the west bank of the Mississippi River in the Parish of Jefferson, acquired 2182.62 acres of land, including the land which is the subject of this condemnation suit, for $7,161,200, an average of about $3,000 per acre. Immediately thereafter, BDF sold 101 acres each to Charalex Lands, Incorporated, which later became the Coast Quality Construction Company, to Ronald J. Isaac and his wife Betty Jane Perrin, and to Regent Development Corporation. Ultimately, Cristina Investment Corporation acquired 97.02 acres, consisting of parcel K-3 acquired on August 17, 1977, and parcel K-4, acquired on March 7, 1978, 69.04 acres of which are subject to this condemnation proceeding (Tract Number 107-24). Cris Realms, Inc. acquired parcel O, containing 25 acres on May 1, 1987, 2.61 acres of which are subject to this condemnation proceeding (Tract Number 107-37). Mr. and Mrs. Isaac acquired parcel 1-C, containing 101.26 acres on September 23, 1972, 56.32 acres of which are subject to this condemnation proceeding (Tract Number 107-22). The present owners are referred to herein collectively as "landowners."

The residential development plans included the building of a canal, a levee, a pumping station to drain the land, and the blocking of waterways which ran through the property.[1] Within one year of acquiring the

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[1] Specifically, BDF's residential development plan called for the blocking of Bayou Boeuf, a natural waterway connecting the Bayou Segnette Waterway and the Gulf Intercoastal Waterway, and the blocking of Kenta Canal, a man-made waterway which extended through BDF's property into Bayou Barataria. Both Kenta Canal and Bayou Boeuf connect to the Gulf of Mexico and therefore, are subject to tidal influence.

land and receiving permission from the Parish of Jefferson, but without any United States Corps of Engineers ("Corps") permit, BDF began construction of a levee and canal system in order to make the property suitable for residential construction.[2] The levee BDF undertook to construct followed the contours of one of several levee lines proposed by the Corps for the construction of a flood control and hurricane protection project.

In January 1974, after BDF's levee was 90% complete, the Corps issued a cease and desist order to BDF, based on the Corps' determination that BDF needed federal permits for construction of the levee and canal projects, pursuant to Section 404 of the Federal Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251 to 1387 (renamed the Clean Water Act in 1977). In February 1975, the United States filed an enforcement action against BDF in the United States District Court for the Eastern District of Louisiana in which the government alleged that BDF had violated Section 10 of the Rivers and Harbors Appropriations Act of 1899 ("RHAA"), 33 U.S.C. § 403. The court issued a final judgment in that case in favor of the United States, requiring BDF to pay $25,000.00 in civil penalties and to submit an "after-the-fact" application to the Corps for the requisite federal permits. *United States v. Bayou Des Familles Dev. Corp.*, No. 75-536 (E.D. La.).

On April 7, 1975, BDF submitted its "after-the-fact" application for federal permits to construct the levee. On

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[2] In July of 1973, BDF entered into a contract for construction of a sewage treatment plant and a pumping station. On August 16, 1973, BDF entered into a contract for the construction of a levee.

April 28, 1975, the Corps published a public notice of BDF's "proposed" project, announcing the Corps' determination that an environmental impact statement was required as part of the permit process. More than four years later, on September 17, 1979, the Corps denied BDF's "after-the-fact" application.

On November 2, 1979, BDF filed suit in the United States District Court for the Eastern District of Louisiana, seeking to enjoin the Corps from denying the "after-the-fact" permit and from recommending the building of a flood control and hurricane protection levee in a location which differed from that of BDF's levee project. On April 20, 1982, the court declined to grant the injunctive relief sought by BDF and determined the BDF's claim that the denial of the permit constituted an uncompensated taking pursuant to the Fifth Amendment of the United States constitution must be brought before the United States Court of Claims, which had exclusive jurisdiction over the matter under Section 1491(a) (1) of Title 28 of the United States Code. *Bayou Des Familles Dev. Corp. v. United States*, 541 F. Supp. 1025 (E.D. La. 1982). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the trial court in an unpublished opinion, and the United States Supreme Court denied BDF's petition for a writ of certiorari. *Bayou Des Familles Dev. Corp. v. United States Corps of Engineers*, 104 S.Ct. 1413 (1984).

In 1986, the Corps granted the West Jefferson Levee District a permit to build a hurricane protection levee in a location which substantially differed from that of BDF's original levee project. Although BDF and the landowners were willing to donate land for the hurricane protection

levee if it were built on BDF's original levee location (Alignment D), they were not willing to donate land for the hurricane protection levee on the location approved by the Corps (Alignment E). Therefore, the West Jefferson Levee District filed an expropriation suit in state court in order to expropriate the land necessary for building the hurricane protection levee on Alignment E.

In the levee expropriation case, the trial court determined that the land condemned should be valued as if it were developable at the time expropriated. The trial court also awarded severance damages, finding that the land left unprotected by the location of the hurricane protection levee was rendered undevelopable; delay damages arising out of the extended duration of the levee alignment selection process; and attorney's fees. The Louisiana Court of Appeal for the Fifth Circuit amended the awards for delay damages and attorney's fees, but otherwise affirmed the trial court. The Supreme Court of Louisiana reversed the court of appeal's decision, holding that the owners failed to carry their burden of proving that their inability to obtain the permits was caused by the hurricane protection levee project itself and specifically found the inability to obtain the permits was caused by the park project. *West Jefferson Levee District v. Bayou Des Familles Dev. Corp.*, 640 So.2d 1258 (1994). This case was remanded to the lower court for a determination of just compensation for the land underlying the levee as undevelopable wetland.

During the pendency of the Louisiana litigation, on July 25, 1991, BDF filed suit against the United States in the Court of Federal Claims, alleging that the Corps' denial of BDF's "after-the-fact" application for permits to

build the ninety-percent complete levee constituted a taking of their property without compensation in violation of the Fifth Amendment to the United States Constitution. The Court of Federal Claims dismissed BDF's suit as time-barred, and on appeal, the United States Court of Appeals for the Federal Circuit affirmed that dismissal. *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034 (1997).

Landowners whose property is condemned for governmental use are protected by the "Takings Clause" of the Fifth Amendment to the United States Constitution, which provides, "[N]or shall private property be taken for public use, without just compensation." A landowner is entitled to receive the fair market value of land taken by the government. *United States v. 320 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979). The fair market value of the land being taken is determined at the time the land is taken and in accordance with the "highest and best use" for which the land is suitable. *Id.* at 781, 818-20. Moreover, the value of the land may be neither increased nor decreased by the fact of the taking itself, pursuant to the "scope of the project rule." *See Almota Farmers Elevator & Warehouse Co. v. United States*, 93 S.Ct. 791, 796 (1973).

Section 4651(3) of Title 42 of the United States Code, which sets forth the guidelines to be used by the heads of federal agencies in determining the value of acquired property, codifies the "scope of the project rule," providing in part:

> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for

> which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

Under the scope of the project rule, the government may not use the impact of a proposed project to devalue the property it seeks to acquire for the project. Nor may the government keep the value of property that it seeks to acquire artificially low by denying the owner of that property permits needed to develop the property. However, a landowner must demonstrate a "reasonable possibility" that, absent the regulatory restriction, permits would be issued or that rezoning would occur which would free the property for use otherwise precluded by the regulatory restriction. *United States v. 320 Acres of Land*, 605 F.2d 762, 819 (5th Cir. 1979).

In the present case, the parties entered into a stipulation that the fair market value of the subject tracts as of April 15, 1996, was approximately $16,000 per acre, subject to a 6% annual increase in value, assuming the highest and best use to be for commercial and residential development, and that the fair market value of the subject tracts as of April 15, 1996, was $300 per acre, assuming their highest and best use to be unpermittable wetlands.[3] It is undisputed that the configuration of the levee determined the growth/no growth line of development, and therefore the subject properties were undevelopable as of

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[3] Pre-trial order, page 17.

the date of the final levee alignment on December 18, 1990.

The landowners argue that, had their land been included within the levee's protection, the highest and best use of the land would be for residential or commercial development and, because the levee alignment was substantially motivated by the park project, the devaluing influence of the levee alignment must be excluded in the valuation of the property for these condemnation proceedings. Because the Park is a wetlands preserve, landowners assert it is impossible to sever the issue of wetlands preservation from the creation of the Park. On the other hand, the government argues that because of the significant adverse impact the proposed BDF project would have had on the ecological balance of the Barataria Basin and the Louisiana Gulf fisheries industry, and because of the landowners' inability to justify the adverse impact on high quality wetlands affected by the BDF project, it is unlikely, even absent the creation of the Jean Lafitte Park, the permits could have been obtained.

The evidence clearly established a reasonable possibility that the landowners would have obtained the permits necessary for development absent the park project. Particularly, General Thomas A. Sands, the District Engineer for the Corps of Engineers in New Orleans District from 1978-1981, who ultimately denied the BDF request for an after-the-fact permit, testified:

> Q: The factor which was controlling of the location of the Bayou Des Familles levee as of 1975 was the Park?

A: The location of the park had a major impact on where that levee would be aligned.

Q: If the BDF levee had been permitted, would it have had an effect on the eventual location of the Federal Westbank Hurricane Protection Levee?

A: It certainly would have.

Q: It would have been determinative, would it not?

A: Yes, I would say that it would.

. . .

Q: Of the factors [that lead to the BDF permit denial], do you think that there was any factor as important as the park?

A: Once again, the Park itself was sort of a focal point for decision making processes in this area at this particular point in time. So, if I were listing the facts that are there, I would say that I would list the location of the park because it was there, as number 1.

Other experts reached the same conclusion on the basis of the historical record development patterns, the history in the surrounding area and the physical characteristics of the subject tracts. Dr. Sherwood Gagliano, an expert in the field of geography, geology and environmental permits, whose opinion this Court expressly accepts, testified:

Q: If the park and its park protection zone did not exist and had not been a factor in the BDF 404 permit process, in your opinion, would that permit have been granted?

A: The BDF permit?

Q: Yes.

A: Yes, it would have.

. . .

Q: If the park and park protection zone did not exist, had not been a factor in the Parish's 404 permit process, for alignment D, would that permit had been granted?

A: Yes, it would have.

Q: Was the park and its park protection zone the major factor which required the rejection of the BDF and the Parish 404 permits?

A: Yes, I think the record clearly reflects that.

. . .

Q: In your opinion, is there any factor other than the park and the Park Protection Zone which require the selection of Alignment E?

A: No.

Q: Was the denial of the BDF permit and the parish 404 permit, essential to overcome the eventual construction of Alignment E. By that I mean, was it necessary to prevent construction of the levee on the BDF alignment and the alignment D right-of-way?

A: Yes, it was.

. . .

Q: In order to preserve that opportunity to place that levee in its current location, the Parish and the BDF permits had to be denied?

A: Yes.

Q: Do you consider the denial of the BDF 404 permit, the creation of the park and the park protection zone and the selection of Alignment E to be multiple phases of the same project?

A: Yes.

Q: Now that alignment E has been selected, is there any possibility that a 404 permit would be issued to BDF or the current property owners for the unprotected remainder of the property?

A: No.

Mr. Joseph Krebbs, an expert civil engineer with expertise in environmental permits for residential subdivisions, also testified to the impact of the Park on the BDF permit application:

Q: Were you involved in the BDF permit application?

A: Yes, I was.

Q: Do you have an opinion with regard to the effect that the creation of the Park had on the permit action on the BDF permit?

A: Yes, I do.

Q: What is that opinion, sir?

A: The opinion is that had it not been for the park and the park protection zone, the permit would have been granted.

Q: Do you think that this was also the case with regard to the permit application for a levee alignment shown as Alignment D that was filed by the Parish of Jefferson?

A: Yes I think so.

The extensive historical documentation supplied as exhibits by the landowners established that the Corps of Engineers decision to deny both the BDF and the Parish's permit was motivated primarily by the influence of the park. That documentation includes:

1. A letter dated June 12, 1972 from the U.S. Committee on Environmental Development to Colonel Hunt, District Engineer, outlining specific requests with reference to conditions and characteristics that pertain to the Parish of Jefferson:

> That the general area designated as the proposed Jean Lafitte National Park (see map 1) have no permits issued for petroleum and or other mining operations. Also that no levee, dikes, canals or other structures be permitted or allowed . . . That no permits be granted that would in any way engender the sites . . . deemed significant in Jefferson Parish.

2. A Corps of Engineers latter dated 3/21/73, stating that at a July 24, 1972, public hearing, "[p]articularly at issue was the compatibility of the possible hurricane protection plans and the proposed Jean Lafitte National Cultural Park."

3. A Corps of Engineers letter dated 6/28/73 to the Jefferson Parish Clerk, stating in part, "we will attempt to determine a levee alignment that would provide the needed hurricane protection and yet be compatible with the plan for the proposed park."

4. A Corps of Engineers letter dated 5/13/74 to the National Park Service, discussing coordination of Levee and Park projects:

> [a]t a public meeting held in connection with these studies on 24 July 1972, we were made aware that proposals under consideration for the Jean Lafitte National Park presented potential conflicts with the proposals for hurricane protection.

5. A Corps of Engineers letter dated 7/25/74 to Senator J. Bennett Johnston, stating that because of the park project, the "Chief of Engineers has neither the authority nor the funds to construct the proposed hurricane protection levees on the west bank of Jefferson Parish."

6. A Corps of Engineers letter dated 9/10/74 to Representative Lindy Boggs stating:

[t]he location of the proposed park is an important consideration in our study of hurricane protection measures for the West Bank of the Mississippi River in the vicinity of New Orleans. Moreover, depending on the type of park recommended, it may be necessary to exclude the park, except for the developed areas requiring protection, from the planned protective works.

7. A letter dated 11/19/75 from the State Park Commission, opposing the permit to BDF due to development of the Park project.

8. A letter dated 4/11/79 from the National Park Service to the Corps of Engineers, objecting to the granting of a § 404 permit to BDF:

> Please note that the levee, canals and pumping station lying between points L and M in the plan accompanying the public notice are within the "core" area of the authorized Jean LaFitte

> National Historical Park. Similarly, the southern portion of the levee along the line L to K is in the National Park. The length involved here is from point L northeastward to approximately the Ross Canal. With a few exceptions, none of which suggest a permissive position toward the destruction or alteration of wetlands, the "core" area will be protected to the same degree all National Parks enjoy. This has the effect of precluding the construction, or in this instance reconstruction to make effective, any levees within the "core" of the park. Most of the remainder of the levee and canal system is located in the "Park Protection Zone" which has the purpose of protecting fresh water flows into the "core" area . . . The project proposed in the permit application would inevitably impact the water resources of the "core" area of the Park, and on that basis we object to the issuance of an "after-the-fact" permit and lament the damage already experienced.

9. A letter dated 4/19/79, from the Corps of Engineers, informing the BDF that its permit would probably be denied due to the impact on the park:

> Reference is made to your application dated 4 April 1975 for an after-the-fact permit for a levee system in Jefferson Parish . . . The impacts of the levee project on the park . . . cause us to believe that your request for a permit will be denied.

10. A letter to James J. Donelon, Jefferson Parish Council President, dated 9/17/79, from the Corps of Engineers, stating that the BDF permit and future alignment of the levee is dependent on park boundaries.

11. A letter dated 9/02/83 from Superintendent James L. Isenogle to Colonel Lee, regarding the effect of BDF levee alignment on the park stating:

> Specifically we are concerned about the possible future use of an alignment used previously by the Bayou des Familles Corporation and located in the Park Protection Zone of the Park. The existing levee, although never completed or closed, has interfered with surface water flow from the Park Protection Zone into the Core area. . . . Certainly the construction of a new and a permanent levee on the Bayou des Familles Corporation alignment would result in the permanent loss of much of the natural surface water flow in the Park unit.
>
> For these reasons, we will oppose the construction of new levees on, or near the alignment of the Bayou des Familles Corporation levees, and plan to seek the dismantling of protion of the existing levee at the appropriate time.

12. A resolution dated 5/09/84, by Jefferson Parish, rejecting the Corp of Engineers' Draft Land Protection Plan for the Park and finding these guidelines "unduly restrict[ed] and limit[ed] the rights of property owners on the West Bank without compensation. . . . "

In addition, the Supreme Court of Louisiana, in *West Jefferson Levee District v. Coast Quality Construction Corp.*, 640 So.2d 1258, 1279 (1994), found that the park was the determinative factor in the ultimate decision to deny the BDF permit:

> [I]t is absolutely clear from the record, and indeed the landowners' own expert in the permitting process, Dr. Sherwood Gagliano, so testified, that BDF's application for § 404 and § 10 permits was denied by the Corps of Engineers in 1979 because of the ramifications resulting from the inclusion of landowners' land in the Jean Lafitte park protection zone, and that BDF would have been unable to obtain such permits at any time after 1979, for the same reason. The record unequivocally shows BDF's permit application was denied by the Corps because of political pressure on the Corps to preserve the landowners' wetlands property as undeveloped and unpermitted wetlands because of its inclusion in the park protection zone of Jean Lafitte.

The Court finds that the Park project was the primary motivating factor in the denial of the Section 10 and 404 permits, and in the location of the hurricane protection levee. Applying the scope of the project rule, this court determines that the landowners have carried their burden of establishing a "reasonable possibility" that as of the date of trial they could have obtained the necessary permits for commercial and residential development but for the Jean Lafitte National Park project. The landowners are therefore entitled to have their land valued with the highest and best use for commercial and residential development.

The stipulation that the market value of the land is $16,000, assuming the highest and best use is commercial and residential development, implicitly decides that such development is economically feasible. During the course of the trial, the court allowed the government to present

evidence with supported its position on the development's lack of economic feasibility. Likewise, landowners presented evidence to show that development was economically feasible. However, any evidence of feasibility was unnecessary because the stipulated value of $16,000 per acre as commercial and residential development could not be determined without an underlying analysis of economic feasibility.

The validity of the stipulation is bolstered particularly by the expert testimony of landowner's expert, Dr. Wade R. Ragas, who determined the highest and best use of the subject property is for commercial and residential development, and reached a market value, as of April 15, 1996, of $16,079 per acre for the Realms and Cristina tracts, and $15,700 per acre for the Isaac tract, almost identical to the stipulated market value. Additionally, Patrick J. Egan, an expert appraiser and executive vice-president and partner in the real estate firm of Latter & Blum, testified on behalf of the government as to the suitability for development of the subject tracts. Mr. Egan admitted, assuming that the subject properties were leveed and drained, that he was in agreement with Dr. Ragas' estimation of value.

> "As I think I stated, if you assume that this land is ready for development and has been drained, has been leveed and is at the required elevation to support development, I would agree with [the values established by Dr. Ragas]."

The government's stipulation to a market value of $16,000 per acre, is conditioned only upon a finding that the highest and best use was for residential and commercial development. Although the government now

attempts to renounce the stipulation, the evidence, viewed as a whole and in light to the scope of the project rule, supports the stipulated amount.

In addition to being entitled to receive market value for land "when the government has physically acquired through its eminent domain powers a portion of a distinct tract of property, 'the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing, of course, injury due to the use to which the part appropriated is to be developed.' " *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996), quoting, *United States v. Grizzard*, 31 S. Ct. 162, 163 (1911). The landowners also assert a claim for severance damages for the difference between the total acreage owned by them and the condemned property. Because the land underlying the levee had been expropriated by the West Jefferson Levee District before the condemnation proceedings herein, landowners are not entitled to severance damages on that portion. However, on the property not expropriated by West Jefferson Levee District nor condemned in these proceedings, landowners have established they suffered severance damages resulting from the taking. "The proper measure of damages in such a case is the difference between the value of the parent tract before the taking and its value after the taking." *Id.* at 1077.

The landowners are therefore entitled to compensation for severance damage of $16,679 per acre before the taking value, minus the $300 per acre after the taking value. The Cristina owners are entitled to severance damages on 8.42 acres, and the Realms owners are entitled to

severance damages on 6.32 acres. Because all of the Isaac property was taken either by the levee expropriation or by this condemnation for the park project, the Isaacs are not entitled to severance damages.

Finally, the landowners' request for reimbursement of taxes paid between the alleged actual interference with their enjoyment of the property and the time compensation is paid, and for prejudgment interest is denied.

Landowner's request for attorneys' fees is referred to magistrate judge for a hearing.

The government is instructed to prepare judgments consistent with this ruling.

New Orleans, Louisiana this 6th day of October, 1998.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30187

UNITED STATES OF AMERICA

Plaintiff – Appellee-Cross-Appellant

v.

LAND; ET AL

Defendants

CRIS REALMS INC

Claimant – Appellant-Cross-Appellee

UNITED STATES OF AMERICA

Plaintiff – Appellee-Cross-Appellant

v.

LAND; ET AL

Defendants

RONALD J ISAAC, Et Ux; BETTY PERRIN ISAAC

Defendants – Appellants-Cross-Appellees

UNITED STATES OF AMERICA

Plaintiff – Appellee-Cross-Appellant

v.

LAND; ET AL

Defendants

CRISTINA INVESTMENT CORPORATION

Defendant – Appellant-Cross-Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

(Filed Jul. 31, 2000)

Before DAVIS, CYNTHIA HOLCOMB HALL,* and SMITH, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

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*Senior Circuit Judge, U.S. Court of Appeals, Ninth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
FEB 2 2001
CLERK

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No. 00-704

In the Supreme Court of the United States

CRIS REALMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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31pp

QUESTIONS PRESENTED

The United States filed complaints in condemnation against three parcels of land in Louisiana, for inclusion in the Jean Lafitte National Historical Park and Preserve. The questions presented are:

1. Whether the court of appeals correctly applied the scope-of-the-project rule in determining the proper market value of the lands for purposes of calculating just compensation.

2. Whether the court of appeals erred in ruling that the landowners could not use the present condemnation action brought by the United States as a vehicle for reviving a time-barred takings claim against the United States based on an Army Corps of Engineers wetland permitting decision made years earlier.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Almota Farmers Elevator & Warehouse Co. v. *United States*, 409 U.S. 470 (1973)	14
Bayou Des Familles Dev. Corp. v. *United States*, 130 F.3d 1034 (Fed. Cir. 1997)	8, 21
Bayou Des Familles Dev. Corp. v. *United States Corps of Eng'rs*, 541 F. Supp. 1025 (E.D. La. 1982)	6, 18
Block v. *North Dakota*, 461 U.S. 273 (1983)	23
Cristina Inv. Corp. v. *United States*, 40 Fed. Cl. 571, appeal dismissed, 155 F.3d 570 (Fed. Cir. 1998)	8, 21
Georgia-Pac. Corp. v. *United States*, 568 F.2d 1316 (Ct. Cl.), cert. denied, 439 U.S. 820 (1978)	22
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986)	17, 20
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	23
Kerr v. *South Park Comm'rs*, 117 U.S. 379 (1886)	14
Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984)	2, 10
Narramore v. *United States*, 960 F.2d 1048 (Fed. Cir. 1992)	23
Olson v. *United States*, 292 U.S. 246 (1934)	13
Plaut v. *Spendthrift Farms, Inc.*, 514 U.S. 211 (1995)	21
Shoemaker v. *United States*, 147 U.S. 282 (1893)	14

Cases—Continued: Page

Stephenson v. *United States*, 33 Fed. Cl. 63 (1994) 22, 23
United States v. *Dalm*, 494 U.S. 596 (1990) 23
United States v. *Dow*, 357 U.S. 17 (1958) 21, 22, 23
United States v. *564.54 Acres of Land*, 441 U.S. 506 (1979) 13
United States v. *422,978 Square Feet of Land*, 445 F.2d 1180 (9th Cir. 1971) 25
United States v. *Meadow Brook Club*, 259 F.2d 41 (2d Cir.), cert. denied, 358 U.S. 921 (1958) 10, 14
United States v. *Miller*, 317 U.S. 369 (1943) 13, 14, 16
United States v. *Mitchell*, 445 U.S. 535 (1980) 23, 24
United States v. *Oppenheimer*, 242 U.S. 85 (1916) 21
United States v. *Reynolds*, 397 U.S. 14 (1970) 13, 14
United States v. *Shaw*, 309 U.S. 495 (1940) 23
United States v. *62.50 Acres of Land*, 953 F.2d 886 (5th Cir. 1992) 20
United States v. *320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979) 13, 14
United States v. *United States Fid. & Guar. Co.*, 309 U.S. 506 (1940) 23
United States v. *Virginia Elec. & Power Co.*, 365 U.S. 624 (1961) 14

Constitution, statutes and rule:

U.S. Const. Amend. V 7, 20
Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*:
§ 404, 33 U.S.C. 1344 3
§ 404(b), 33 U.S.C. 1344(b) 19
Flood Control Act of 1971, 33 U.S.C. 701 4
Rivers and Harbors Appropriations Act of 1899 § 10, 33 U.S.C. 403 3
Tucker Act:
28 U.S.C. 1491 ..... 7, 22
28 U.S.C. 2501 8

Statutes and rule:	Page
16 U.S.C. 230	5
16 U.S.C. 230a(a)	5
16 U.S.C. 230a(b)	5
16 U.S.C. 230a(c)	5
16 U.S.C. 230a(e)	5
Fed. R. Civ. P.:	
Rule 71A	2
Rule 71A(i)(3)	22
Miscellaneous:	
40 Fed. Reg. (1975):	
p. 31,320	19
p. 41,292	19

In the Supreme Court of the United States

No. 00-704

CRIS REALMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 213 F.3d 830. The opinion of the district court (Pet. App. 27-45) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2000. A petition for rehearing was denied on July 31, 2000. Pet. App. 46. The petition for a writ of certiorari was filed on October 30, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this condemnation action to acquire three parcels of land in Jefferson Parish, Louisiana, for an expansion of the Jean Lafitte National Historical Park (Jean Lafitte Park). The only dispute in this case concerns the just compensation to be paid for each parcel. Although petitioners conceded that the market value of their lands at the time they were condemned was limited to their use as non-permitted wetlands, petitioners argued that the lands should be appraised as ready for development because, years earlier, the U.S. Army Corps of Engineers had denied permits that, if granted, would have made development feasible. The district court agreed. The court of appeals reversed, finding that the district court had misapplied established doctrines of valuation.

1. This case began with complaints in condemnation filed in October and November 1994 against three parcels of land, including 2.61 acres of land owned by petitioner Cris Realms, Inc.; 56.32 acres of land owned by petitioners Ronald J. and Betty Perrin Isaac; and 69.04 acres of land owned by petitioner Cristina Investment Corporation. The United States has not taken physical possession of those lands. Rather, the United States filed complaints under Federal Rule of Civil Procedure 71A to establish the amount of compensation that the United States would have to pay to acquire title. See *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 4 (1984). The lands are all wetlands lying in the Barataria Marsh, on the unprotected side of a flood control levee. Gov't C.A. Br. 3-4. There is no dispute that the lands are not suitable for development in their present condition.

In nevertheless seeking to have those lands valued as suitable and ready for development, petitioners asked the district court to look back to the history of a failed private development project that began more than 20 years before the complaints in condemnation were filed. All three parcels subject to condemnation were once part of a larger parcel (more than 2000 acres in size) owned by the Bayou Des Familles Development Corporation (BDF). Pet. App. 3. BDF acquired the property in August 1972 for a residential development project. In accordance with its development plan, BDF subdivided and sold portions of the property to petitioners Mr. & Mrs. Isaac in 1972, to petitioner Cristina Development Corporation in 1977 and 1978, and to petitioner Cris Realms, Inc., in 1987. *Ibid.*

As part of the development plan, BDF began construction of a levee to allow the wetlands to be drained and to protect the property from storm surges. Pet. App. 3. BDF began that construction—which involved the discharge of fill material into wetlands and the obstruction of navigable canals—without obtaining a permit from the Army Corps of Engineers under Section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 403, or Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344. Gov't C.A. Br. 8-9; Pet. App. 3. In October 1973, the Corps advised BDF to cease work on the levee, pending a determination as to whether permits were required. BDF refused to halt construction, insisting that permits were not necessary. In January 1974, the Corps issued a cease and desist order. Ultimately, BDF was fined $25,000 and ordered to obtain permits from the Corps before continuing the work. Pet. App. 3.

BDF submitted an application in April 1975, and a draft environmental impact statement (EIS) in June

1975. Pet. App. 3. The draft EIS revealed significant environmental concerns. Among other things, it noted that draining the land for development would "result in the total and complete alteration of the presently productive natural marsh and swamp habitats," would eliminate habitat for many wildlife species, including a rare and endangered species (the American Alligator), and would adversely affect "surrounding wetland productivity" by reducing the "normal flow of nutrients and minerals" to adjacent areas. Gov't C.A. Br. 10. The draft EIS also reported that the project would decrease water quality in surrounding wetlands through the introduction of "oils, trash, chemical fertilizers, insecticides, and other deleterious substances" in storm-water runoff. *Id.* at 10-11; see Pet. App. 4. In December 1975, Charles Decker, Chief of the Regulatory Functions Branch of the New Orleans District of the Corps of Engineers, wrote a memorandum to his supervisors stating that "all comments on the * * * application and draft EIS have been received," and that "strong opposition has been expressed by EPA, NMFS [the National Marine Fisheries Service], USFWS [the United States Fish and Wildlife Service], the State Parks and Recreation Commission, and the State Planning Office." Gov't C.A. Br. 10; see Pet. App. 3. Decker concluded that "in our opinion, there is sufficient information available now to support a recommendation for denial without preparing the final EIS." Gov't C.A. Br. 10.

For several reasons, however, the Corps delayed its decision on BDF's permit application. A separate branch of the Corps was studying proposals for the construction of a larger, hurricane-protection levee, under the Flood Control Act of 1917, 33 U.S.C. 701, to protect existing developments on the west bank of

Jefferson Parish. One of the proposals under consideration included construction along the alignment of the unfinished BDF levee. Also, in August 1972, Congress had appropriated funds to study the feasibility of creating the Jean Lafitte Park in the Barataria Marsh. Uncertainty over the location and boundaries of the Park caused delays in the Corps' study of possible alignments for the hurricane-protection levee. Gov't C.A. Br. 11-12.

Congress authorized creation of the Jean Lafitte Park on November 10, 1978. See 16 U.S.C. 230; Pet. App. 4. The enabling legislation identified a block of approximately 20,000 acres of Barataria Marsh as the site for the Park itself and a surrounding "park protection zone." *Ibid.* The legislation authorized the Park Service to acquire up to 8600 acres of designated land for the Park. See 16 U.S.C. 230a(a). The legislation directed the Park Service to protect the remaining area, the "park protection zone," by establishing land-use guidelines to be adopted and enforced by state and local governments. 16 U.S.C. 230a(b). The purpose of the guidelines was to preserve and protect (a) fresh water drainage from the protection zone into the Park, (b) vegetative cover, (c) the "integrity of ecological and biological systems," and (d) water and air quality. 16 U.S.C. 230a(c). The legislation authorized the Park Service to acquire land in the protection or buffer zone only for those enumerated purposes and only if state and local governments failed to adopt protective land-use guidelines. 16 U.S.C. 230a(e). Approximately 1000 acres of the land in the BDF development project, including all three properties subject to condemnation in this case, fell within the park protection zone. Pet. App. 4.

The Corps denied the BDF permit application by letter dated September 21, 1979. In the accompanying findings of fact, the Corps of Engineers concluded that: (1) the project (residential development) was not "water or wetland dependent"; (2) there were nearby "nonwetland" alternative sites for such development; (3) the project would have "major adverse environmental impacts" (including the destruction of 2300 acres of valuable fish and wildlife habitat); (4) the project would have "major adverse impacts on Jean Lafitte National Park" (including the degradation of water quality in the Park); (5) "approval of the project would not be in concert with national policies on development of floodplains and preservation of wetlands"; and (6) the adverse impacts were sufficiently significant to justify permit denial without preparation of a final environmental impact statement. Gov't C.A. Br. 14-15. The Corps also found that there was significant public opposition to the project, and that although some local government agencies, including the Jefferson Parish Council and the Jefferson Parish Planning Commission, expressed support, the Louisiana State Planning Office and the State Parks and Recreation Commission submitted letters in opposition. *Id.* at 14-15; Pet. App. 3-4.

2. On November 2, 1979, BDF filed suit in federal district court challenging the Corps' denial of its permit application. See *Bayou Des Familles Dev. Corp.* v. *United States Corps of Eng'rs*, 541 F. Supp. 1025 (E.D. La. 1982). The district court sustained the Corps' decision. The court concluded that "comments from the public and from other federal agencies relating to the environmental effects of the proposed work" were "[o]f key concern" to the Corps, and the court explained that, under applicable regulations, the Corps was required to consider the "ecological consequences" of the project

and could "properly deny a permit on ecological grounds." *Id.* at 1038. BDF argued that the permit denial resulted in an uncompensated taking of its property in violation of the Fifth Amendment to the Constitution. The court dismissed that claim for lack of jurisdiction, because the exclusive remedy for such an uncompensated taking is an action for compensation in the Court of Claims (now the Court of Federal Claims). *Id.* at 1042 (citing the Tucker Act, 28 U.S.C. 1491).

Following dismissal of that suit, BDF did not immediately file suit in the Court of Claims. Instead, BDF turned to Jefferson Parish. Under the federal Flood Control Act, municipalities are responsible for obtaining rights-of-way for federally funded flood control projects. BDF offered to donate land to Jefferson Parish for the federal hurricane-protection levee, if the Parish would pursue construction along BDF's original levee alignment (designated "alignment D" in previous studies). Following the public review process, the Corps denied the Parish's permit application for construction along alignment D. However, it offered the Parish a permit for construction along "modified alignment E," an alignment that followed the wetlands/uplands interface and that—unlike alignment D—minimized adverse impacts on the wetlands. Gov't C.A. Br. 20. The Corps found, among other things, that the wetlands of the Barataria estuary were "very important to fisheries production" and "one of the best such areas in the world." *Ibid.* Although the Corps noted impacts on the Jean Lafitte Park, it did not mention the Park in its official findings or conclusion. *Id.* at 20-21. The Parish Council did not seek review of the Corps' decision, and instead decided to proceed with construction along alignment E. *Id.* at 21. The Parish then condemned some of the land owned by petitioners to build

the levee. After considerable litigation in state court, petitioners were awarded compensation based on the value of the land as undevelopable wetlands. Pet. App. 6. The three parcels at issue in this case lie outside of the constructed levee, and were not subject to the state condemnation action.

BDF then, in 1991, filed a takings case in the Court of Federal Claims, joined by the Isaacs petitioners. See *Bayou Des Familles Dev. Corp.* v. *United States*, 130 F.3d 1034 (Fed. Cir. 1997). The court dismissed the suit as time-barred under the applicable six-year statute of limitations (28 U.S.C. 2501), and the court of appeals affirmed. 130 F.3d at 1037. BDF and the Isaacs argued that the alleged taking was not final until 1986, when the Corps granted Jefferson Parish a permit to build a federal hurricane-protection levee on a location that left their land unprotected. *Id.* at 1039. The Federal Circuit disagreed, holding that the takings claim ripened in 1979, when the Corps denied BDF's permit application. *Id.* at 1040. Petitioners Cristina Investment and Cris Realms filed an even later takings case, with the same result. *Cristina Inv. Corp.* v. *United States*, 40 Fed. Cl. 571, 579-580, appeal dismissed, 155 F.3d 570 (Fed. Cir. 1998) (Table).

Meanwhile, pursuant to the directive in Section 230a(b) of the enabling legislation for the Jean Lafitte Park, the National Park Service developed proposed land-use guidelines for property in the park protection zone and submitted the guidelines to Jefferson Parish. Gov't C.A. Br. 22. The Parish rejected the proposal in 1984, primarily because the Park Service would not indemnify the Parish for any liability arising out of the guidelines' enforcement. After negotiations failed to produce an agreement, the Park Service initiated plans in 1986 to acquire land in the protection zone, under the

authority of 16 U.S.C. 230a(c), which authorizes acquisition upon the failure of local government to promulgate land-use guidelines. See Gov't C.A. Br. 22-23.

3. In 1994, the United States filed complaints in condemnation to acquire the properties at issue in this case. At trial, the primary disagreement between the United States and petitioners was over the methodology for appraising the properties. The government's appraiser looked to sales of comparable wetlands properties that had not been (and were unlikely to be) permitted for residential development. He testified that the subject properties were worth approximately $300 per acre. Gov't C.A. Br. 23; Pet. App. 6. Petitioners' appraiser, in contrast, looked to the value of non-wetlands properties that were ready for development. He thus based his valuation on the market price that the subject properties would have had if: (1) the Corps had granted BDF's permit application; (2) BDF had completed its levee and other infrastructure improvements; and (3) the federal hurricane-protection levee had been built over the BDF levee. Gov't C.A. Br. 23-24. Petitioners' appraiser opined that the subject properties were worth approximately $16,000 per acre. Pet. App. 7.

The district court accepted the landowners' appraisal, Pet. App. 42, and awarded compensation accordingly, *id.* at 24-25. The court found that establishment of the Park had indirectly affected the value of the land through the regulatory actions of the Corps of Engineers. In particular, the court found that the Park was the "primary motivating factor" in the Corps' denial of permits for the BDF levee alignment, and that there was a "reasonable possibility" that petitioners could have obtained necessary development permits "but for" the Park. *Id.* at 42. Based on those findings,

the court held that petitioners were entitled to have their land valued as though the highest and best use were for "commercial and residential" development. *Ibid.*

4. The court of appeals reversed. Pet. App. 1-23. The court first considered the application to this case of the "scope of the project" rule, which provides that if the land that is subject to condemnation was within the scope of the project for which it is being condemned at the time the government became committed to the project, any increase or decrease in the value of the condemned land attributable to the project should not be taken into account in valuing the land. See *id.* at 9. In previous cases, the court of appeals explained, it had considered three factors when determining whether later acquisitions fell within the scope of the original project: (1) whether enlargement of the project was foreseeable; (2) the length of time between initiation of the project and its enlargement; and (3) the nature of governmental representations about the final borders of the project. *Id.* at 10. The court of appeals further explained that, in *United States* v. *Meadow Brook Club*, 259 F.2d 41, cert. denied, 358 U.S. 921 (1958), the Second Circuit had "articulated a further consideration that is instructive" in this context, which is whether the government's motive for pre-acquisition regulatory efforts was "to depress the market value of the property which it then intended to condemn." Pet. App. 11.

Applying those factors to this case, the court of appeals found that the scope-of-the-project rule did not justify valuing petitioners' land as if it were ready for development. The pertinent project, the court explained, was the acquisition of land for Jean Lafitte Park. Although the Park was created in 1978, there was no evidence that the government contemplated

buying—or that Congress had authorized the Park Service to buy—petitioners' land until much later. Pet. App. 12. In fact, when the Corps denied BDF's permit application in 1979, "there were no concrete plans to purchase any land in the park protection zone. Those plans to acquire lands did not begin until 1986, and the Government did not file condemnation complaints against [petitioners'] property until 1994." *Ibid.* Thus, the court of appeals concluded:

> [T]here was a sixteen-year lapse between the initiation of the project [Jean Lafitte Park] and the acquisition of [petitioners'] property; the Government action that reduced the value of [petitioners'] property (the denial of the permit application) predated any concrete plans to purchase that property; and, as in *Meadow Brook*, there is no evidence that the Government's motive in denying the permit application was to drive down the value of [petitioners'] property. Rather, the record clearly indicates that the Corps' primary purpose in denying the permit was to protect the Park's ecosystem. On these facts, compensation should be based on the value of the land at the time of the condemnation, regardless of prior Government actions that rendered the land less valuable than it might have been in the absence of prior Government activities.

Id. at 13 (footnote omitted).

The court of appeals also rejected an additional theory presented by petitioners. Although the United States has not yet sought or taken physical possession of petitioners' properties, petitioners argued: (a) that the filing of this action vested the district court with jurisdiction to determine the date of taking, (b) that the district court could invoke that authority to find that

the taking in this case actually occurred in 1979, when the Corps denied the BDF permit application, and (c) that the district court could award compensation from that date. The court of appeals rejected that theory. Pet. App. 13-21. While recognizing the possibility that a district court might in some situations have jurisdiction in a direct condemnation action to award compensation based on a taking date prior to the date of the declared taking, the court of appeals observed that petitioners' argument for allowing the court in the condemnation action to go back in time was subject to no "temporal limiting principle." *Id.* at 14. Without deciding what the result might be in other circumstances, the court of appeals held that where, as here, an inverse condemnation claim based on an alleged prior regulatory taking has been brought in a court of competent jurisdiction and dismissed as time-barred, that dismissal is res judicata and the claim cannot be "resuscitate[d]" in a later direct condemnation action. *Id.* at 15-20.

ARGUMENT

The court of appeals correctly concluded that petitioners are entitled to compensation based on the current value of their land, rather than on the hypothetical value the land would have had if it had not been subject to the legitimate permit denial more than 20 years ago that petitioners had unsuccessfully challenged in two different lawsuits. The court of appeals' fact-specific decision, moreover, does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Under established principles of eminent domain, the "just compensation" for land acquired by condemnation is generally the "fair market value of the property

on the date it is appropriated." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984) (citing *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511-513 (1979)). In other words, the government is required to pay the owner "what a willing buyer would pay in cash to a willing seller at the time of the taking." *Ibid.* (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943) (citation and internal quotation marks omitted)). Because markets generally value land in terms of both current and potential use, courts ordinarily must determine fair market value in light of the "highest and most profitable use," or most economically profitable use, that the land will support. *Olson* v. *United States*, 292 U.S. 246, 255 (1934). In so doing, however, courts must take into account any "inherent physical characteristics" limiting use of the land, and any "regulatory restrictions applicable to the property and the proposed use." *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 818 (5th Cir. 1979). A court may not, for example, consider a use prohibited by zoning rules or other regulations, unless the landowner can establish a "reasonable possibility" that the prohibition will be lifted and the use allowed. *Id.* at 819. Further, courts must also consider value attributable to neighboring land uses, including uses related to public improvements. As a general rule, such influences are to be considered when the government condemns land, just as they would be considered by willing buyers and sellers in a market transaction. See *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); see also *Miller*, 317 U.S. at 376.

This Court, however, has recognized that the effect of government activities in some instances should not be considered when determining market value. For example, if a parcel's fair market value on the date of acquisition has been increased by the acquisition itself

or in anticipation of the acquisition, the evidence of such value must be excluded. See *Miller*, 317 U.S. at 377. That rule originated in two earlier opinions, *Shoemaker* v. *United States*, 147 U.S. 282 (1893), and *Kerr* v. *South Park Commissioners*, 117 U.S. 379 (1886), both of which involved condemnation of land for parks. In those cases, the Court upheld instructions directing the finder of fact to disregard the value of land sold in the immediate vicinity of the proposed parks after the projects were announced. See *Shoemaker*, 147 U.S. at 303-305; *Kerr*, 117 U.S. at 385-387. The Court reasoned that those sales did not reflect fair market value, but instead included "conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had." See *Shoemaker*, 147 U.S. at 305 (citing *Kerr*, 117 U.S. at 380). Likewise, this Court has more recently held that a reduction in property value caused by the "threat" of condemnation must not be considered in setting just compensation. See *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961); see also *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 477 (1973).

The principle just described has come to be known as the "scope of the project" rule. See *Miller*, 317 U.S. at 377; *320.0 Acres*, 605 F.2d at 785. Under that rule, the measure of just compensation in a condemnation proceeding must not be "reduced or increased" because of an "alteration in market value" attributable to the "public project that makes the condemnation necessary." *Reynolds*, 397 U.S. at 16. In *United States* v. *Meadow Brook Club*, 259 F.2d 41, cert. denied, 358 U.S. 921 (1958), the Second Circuit considered the application of that principle where the pre-condemnation action that affected the value of the land was not earlier

acquisition of property for the project but rather land-use regulation. *Meadow Brook* involved action by the Air Force to condemn land to enlarge an airfield. *Id.* at 43. Before condemnation, a representative of the Air Force had appeared before a local zoning board to oppose the landowner's request to change the property's zoning from residential to industrial. *Id.* at 44. The issue before the Second Circuit was whether the district court could consider that opposition when determining the "probability of rezoning (as a factor entering into the ultimate calculation of value)." *Id.* at 45. The Second Circuit held that the Air Force's opposition could be considered, in light of evidence that the Air Force's position was "based in large part on the fear of flight hazards," a concern independent of any interest in acquiring the land. The court stated that if the Air Force had acted in "bad faith"—*i.e.*, if its "sole motive" in opposing the zoning change had been to "depress the market value of the property which it then intended to condemn"—then the impact of its opposition on land value would have been excluded. *Id.* at 45-46.

a. Petitioners first argue that the court of appeals erred in making "bad faith" an indispensable element that must be shown before the scope-of-the-project rule can apply. Pet. 14-18. The difficulty with that contention is that the court of appeals did not hold that bad faith is an indispensable element or that a party seeking application of the scope-of-the-project rule always must show bad faith. To the contrary, in this case, the court of appeals recited three other factors previously identified as relevant by the Fifth Circuit, Pet. App. 10, and then identified what petitioners label "bad faith" as "a further consideration that is instructive" in cases, like this one, in which land-use regulation (here, the

Corps' permit denial) allegedly affected land values before the government moved to acquire it, *id.* at 11. Moreover, in concluding that the Corps' permit denial in 1979 did not bring the condemnation actions commenced in 1994 within the scope of the original project, the court of appeals considered all of the factors it had previously identified as relevant, including the foreseeability of the later condemnation when the government first regulated the land in a manner that reduced its value, the length of time between the regulation and the later condemnation, and governmental representations regarding the scope of the project. See *id.* at 12-13. The court merely concluded that, under the circumstances of this case, in which consideration of those *other* factors did not bring this condemnation action within the scope-of-the-project rule, that rule would not apply unless the record showed "that when the Corps denied BDF's permit application in 1979, it anticipated that the denial would drive down the price of [petitioners'] property and that this would facilitate the * * * eventual acquisition of the land." *Id.* at 12.

That holding is fully consistent with this Court's decisions. As we have explained, the Court developed the scope-of-the-project rule in a case involving direct effects on market value caused by a series of condemnations of adjacent lands. See *Miller*, 317 U.S. at 377. The Court held that if the later-acquired lands were part of the initial commitment to acquire lands for the project, any increase in value in the interim could be attributed to "speculating * * * due to the Government's activities." *Ibid.* In contrast, if the lands were "merely adjacent lands" that the government later decided to acquire as part of a subsequent commitment to enlarge the original improvement, any value added in the interim by virtue of the adjacent lands' proximity to

the existing improvement would be an element of market value for which the landowner was entitled to compensation. *Ibid.*

Similarly, under *Meadow Brook* and the Fifth Circuit's decision here, if the government previously invoked a regulatory process as part of its acquisition process (in order to depress land values to facilitate acquisition), the effects of those actions on land values are to be excluded from the determination of just compensation. 259 F.2d at 45. On the other hand, if the government invoked a regulatory process to further legitimate government interests independent of the later acquisition, the regulatory actions are properly considered part of the existing landscape against which fair market value is to be determined. *Id.* at 46. Here, as in *Meadow Brook*, the court found that the prior regulation was undertaken for reasons independent of the land acquisition and that the effect of that valid prior regulation on the value of the land therefore should be taken into account in determining just compensation in the condemnation action. That fact-bound application of the general scope-of-the-project principle of *Miller* to the circumstances of this case presents no issue warranting review by this Court.

b. Alternatively, petitioners argue that the court of appeals engaged in improper de novo fact-finding in conflict with *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), by declining to remand the "bad faith" issue to the district court. Pet. 18-21. But petitioners' brief on the merits in the court of appeals never asked for a remand, and the claim of error they now assert is wholly fact-bound. The court of appeals merely determined that there was insufficient evidence to show that the denial of BDF's permit application was undertaken for the purpose of depressing land values to facilitate

acquisition. Especially in light of the presumption of regularity that accompanies agency action—and the fact that petitioners had already challenged the agency's decision under the Administrative Procedure Act and lost—the court of appeals' decision was correct and presents no issue warranting review by this Court.[1]

The Corps of Engineers denied BDF's permit application upon written findings of fact supported by an administrative record. In its findings, the Corps determined that completion of the BDF levee would result in the destruction of a large area of important wetlands, thereby causing major adverse environmental impacts that could not be justified, given the availability of alternative sites for development. See p. 6, *supra*. The Corps also determined that the BDF levee would have adverse impacts on Jean Lafitte Park,

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[1] Petitioners assert (Pet. 6) that the *Park Service* had an ulterior motive for the position it took before the Corps of Engineers. The Park Service's memorandum, however, does not say what petitioners claim it says. It merely notes that some landowners might be demanding the right to develop their lands in order to force the government to exercise its power of eminent domain, and that the government should not allow its hand to be so forced. Gov't C.A. Br. 47-48. Far from evidencing a desire to acquire the land, the memorandum thus exhibits a desire to avoid that result. Moreover, the Park Service's comments to the Corps do not even hint at a secret plan or desire to acquire the lands later on, and nothing in the record suggests that the Corps' decision to deny the permit application was influenced by anything but legitimate regulatory concerns. Indeed, when petitioners challenged the Corps' permit denial in district court under the APA, the district court held that the Corps had properly analyzed the environmental concerns and correctly denied the permit on ecological grounds. See *Bayou Des Familles Dev. Corp.*, 541 F. Supp. at 1038. Petitioners cannot now collaterally attack that determination in the context of a new action brought decades later.

because the draining and polluting of wetlands outside the Park would damage water quality and water flows into the Park. *Ibid.* Whether the Corps would have denied the permit for ecological reasons, absent the concern for protecting the Park, was disputed at trial, as petitioners point out.[2] But that is not the relevant question in this context. The relevant question is whether the permit was denied for the purpose of devaluing the lands to facilitate their acquisition, *i.e.*, whether, but for plans to acquire the lands later on, the permits would have been granted. In this case, the need to preserve wetlands in the area of the BDF development project, and the need to protect water flows into Jean Lafitte Park, were both legitimate grounds for denying BDF's permit application, and both of those reasons were independent of whether the government might later acquire the land being regulated. Petitioner never proved nor offered to prove at trial in this case, or in their prior APA action, that the Corps' statement of reasons was a pretext for devaluing the land so as to facilitate its later acquisition. See Pet. App. 13 n. 1.[3]

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[2] The district court found that the Park was the "primary motivating factor" in the Corps' denial of the BDF permit. Pet. App. 42. On appeal, the United States argued that that finding was clearly erroneous, in light of the regulations governing permit applications under Section 404(b) of the Clean Water Act of 1977 (33 U.S.C. 1344(b)), which emphasized wetlands impacts and required BDF to prove that there was "no practicable" alternative site for development, other than the wetlands in question. See Gov't C.A. Br. 51-57 (addressing 40 Fed. Reg. 31,320 (1975) (Corps' regulations), and 40 Fed. Reg. at 41,292 (EPA regulations)). The court of appeals did not reach that question.

[3] As noted by the court of appeals (Pet. App. 13 n.1), petitioners had every incentive to present such evidence at trial. Although the precise question in *Meadow Brook* was not presented to the

For the foregoing reasons, this case is not at all like *Icicle Seafoods*. That case involved the standard of review applicable to trial court decisions under the Fair Labor Standards Act of 1938. 475 U.S. at 710-712. Although some courts of appeals had read this Court's decisions to allow de novo appellate review of certain factual questions, the Court held that de novo review was not appropriate. This case, by contrast, does not involve a question of de novo review of factual issues. The court of appeals simply determined that the record did not contain sufficient evidence to support a judgment for one of the parties. That is the sort of decision that courts of appeals regularly and properly make.

2. Finally, petitioners argue (Pet. 21-27) that the court of appeals erred in rejecting their attempt to resuscitate their time-barred taking claims. As noted above (see p. 8, *supra*), petitioners previously filed suits under the Tucker Act in which they asserted that the 1979 permit denial resulted in a taking of their property for which compensation was due under the Fifth Amendment. The Federal Circuit and the Court of Federal Claims held that those suits were time-barred. *Bayou Des Familles Dev. Corp.* v. *United States*, 130 F.3d 1034 (1997); *Cristina Inv. Corp.* v. *United States*, 40 Fed. Cl. 571 (1998). Because the judgments in those actions operate as adjudications on the merits, see

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district court in this case, petitioners did present evidence and argument regarding the motives of the Corps and the Park Service. Petitioners have failed to identify any material deficiency in the factual record that could be corrected on remand. Further, contrary to petitioners' assertion (Pet. 20-21), it was not the United States' obligation to identify and advance a theory supporting petitioners' claim of highest and best use. That burden rested with them. See *United States* v. *62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992).

Plaut v. *Spendthrift Farms, Inc.*, 514 U.S. 211, 228 (1995); *United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916), petitioners are now foreclosed from seeking compensation for the 1979 permit denials in later lawsuits, including this one. Thus, quite aside from the limitations imposed by the scope-of-the-project rule discussed above, the doctrine of res judicata now limits petitioners to seeking compensation only for those events that took place after they filed their time-barred taking claims.

Petitioners argue that res judicata does not apply here. In particular, they argue that this Court's decision in *United States* v. *Dow*, 357 U.S. 17 (1958), stands for the proposition that district courts always have jurisdiction in direct condemnation actions to award compensation for prior takings, notwithstanding otherwise applicable jurisdictional limits, statutes of limitations, or prior litigation involving an inverse condemnation claim. Pet. 21-27. *Dow*, however, does not support that contention. In *Dow*, the United States filed a complaint in condemnation for an easement, took possession of the easement under a court order, and then filed a formal declaration of taking for the easement. 357 U.S. at 18-19. Between the date on which the United States took possession and the date on which it filed the declaration of taking, the underlying tract was conveyed. *Id.* at 19. Because claims against the United States cannot be assigned, this Court had to determine on which of the two dates the taking occurred, in order to determine which private party (the seller or purchaser) was entitled to compensation. *Id.* at 20. The Court held that the taking occurred when the United States entered into possession under the court order. *Id.* at 22-27. That ruling recognized that when the United States files a com-

plaint in condemnation, the district court has authority to grant possession on the complaint and to order compensation for the possession, even though a formal declaration of taking has yet to be filed. See also Fed. R. Civ. P. 71A(i)(3) (authorizing district court to award compensation for interests taken by United States after filing complaint).

Dow did not address the effect that an earlier *judgment* has in later litigation. And it certainly does not hold that an earlier judgment that a claim for just compensation based on certain events is time-barred loses its preclusive effect in later litigation over the amount of compensation due for a *subsequent* taking. The two trial court rulings relying on *Dow* cited by petitioners—*Georgia-Pacific Corp.* v. *United States*, 568 F.2d 1316 (Ct. Cl.), cert. denied, 439 U.S. 820 (1978), and *Stephenson* v. *United States*, 33 Fed. Cl. 63 (1994)—are inapposite for the same reason.[4]

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[4] *Georgia-Pacific* involved parallel condemnation actions: an inverse condemnation action filed in the Court of Claims and a later direct condemnation action filed by the United States in district court. See 568 F.2d at 1318. Under the Tucker Act, the Court of Claims had exclusive jurisdiction over the inverse condemnation claim. See 28 U.S.C. 1491. Nevertheless, for reasons of judicial economy, the Court of Claims declined to entertain the claim, in deference to the later-filed proceedings in district court. See *Georgia-Pac.*, 568 F.2d at 1319. The Court of Claims reasoned that the district court could resolve all compensation issues—*i.e.*, those related to both the direct condemnation and the alleged inverse condemnation—because, under *Dow*, the district court had jurisdiction to determine the date of taking and award compensation from that date. *Id.* at 1322. In *Stephenson*, the Court of Federal Claims followed *Georgia-Pacific* on similar facts. See 33 Fed. Cl. at 63.

Even if those two trial court decisions were correct (and we do not believe they were), neither addressed the preclusive effect of a

Finally, petitioners assert (Pet. 24-27) that res judicata does not apply because the previous decisions in the Tucker Act suits were not "on the merits." Although judgments on statute-of-limitations grounds are generally considered to be on the merits for res judicata purposes, petitioners contend that that rule does not apply to judgments applying the Tucker Act's statute of limitations, because in that setting the statute of limitations restricts the scope of the waiver of sovereign immunity and thus is jurisdictional. Pet. 24. That contention is without merit. It is true that, when conditions are placed on a waiver of sovereign immunity, those conditions necessarily "define [a]

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judgment regarding an alleged taking on later litigation regarding a later taking. Moreover, in our view, those decisions mistakenly relied on *Dow* for the proposition that a district court may exercise jurisdiction over an inverse condemnation claim that is within the exclusive jurisdiction of the Court of Federal Claims, if those claims are alleged in response to a direct condemnation action instituted by the United States. *Dow* did not address that jurisdictional issue. In *Dow*, the "prior" taking was not an alleged inverse condemnation prior to the direct condemnation, but rather a physical taking that occurred under court order in the direct condemnation action itself. See 357 U.S. at 22-27. That distinction is fundamental. As sovereign, the United States is immune from suit, except as it consents to be sued. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Only Congress can waive the United States' sovereign immunity, *Block* v. *North Dakota*, 461 U.S. 273 (1983), and such waivers "cannot be implied but must be unequivocally expressed." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). Consequently, the United States does not, simply by filing its own action, waive sovereign immunity to a counterclaim that is subject to the exclusive jurisdiction of another court. See *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 512-515 (1940); *Narramore* v. *United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992).

court's jurisdiction to entertain the suit," and thus are in that important sense "jurisdictional." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). But it does not follow that a judgment on statute-of-limitations grounds in a Tucker Act suit does not *also* have the effect of judgments on such grounds generally, insofar as the doctrine of res judicata is concerned. Indeed, it would be an odd result if the special jurisdictional nature of statutes of limitation in suits against the United States, which affords the government *added* protection not available to private parties against the assertion of untimely claims, had the effect of depriving the United States of even the usual preclusive effect of a judgment on statute-of-limitations grounds.

Petitioners also claim that the Tucker Act statute of limitations is inapplicable to their request for compensation based on the alleged 1979 regulatory taking, because that request is not in the nature of a counterclaim, but simply part of the compensation due for the proposed acquisition of title at issue in the present case. Under that theory, however, petitioners' regulatory takings claim could never be time-barred, and could always spring back to life if made in response to a direct condemnation action. As the court of appeals observed, that notion is at odds with this Court's holdings that waivers of sovereign immunity must be narrowly construed. Pet. App. 16. Further, it is at odds with existing precedent that holds that a direct condemnation action filed by the United States does not revive a party's right to compensation for an inverse condemnation that was lost under the statute of limitations. See *United States* v. *422,978 Square Feet of Land*, 445

F.2d 1180, 1188 (9th Cir. 1971).[5] The court of appeals' refusal to adopt petitioners' novel legal theory therefore does not warrant review by this Court.

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[5] Petitioners' attempts to distinguish *422,978 Square Feet* (Pet. 23-24) are unpersuasive. In that case, the United States filed a complaint in condemnation against submerged lands in San Francisco Bay. The United States had taken physical possession of those lands years earlier. 445 F.2d at 1181-1183. The United States urged two distinct reasons why no compensation was owed to the State of California: (1) the land was subject to a navigational servitude; and (2) the State had failed to file a timely inverse condemnation action under the Tucker Act. *Id.* at 1184-1188. Contrary to petitioners' suggestion (Pet. 23- 24), the two issues were not interdependent. On the latter issue, the court of appeals ruled that the United States' complaint in condemnation was not itself a taking, but simply a method of adjudicating rights to compensation. 445 U.S. at 1188. Because the property in question had already been taken, and because the State had failed to file a timely action seeking compensation for that taking under the Tucker Act, the State's right to compensation was lost. The court of appeals held that the United States did not lose the ability to raise the statute of limitations against the inverse condemnation claim simply because it had filed a direct condemnation action. *Ibid.* It follows *a fortiori* that petitioners' regulatory takings claim is barred, because here there is a prior *judgment* holding that the inverse condemnation action is time-barred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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